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WHAT: Free public briefings (approximately 3 hours) to present:

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WHY: To provide the public with access to information necessary to research Federal agency regulations which directly affect them. There will be no discussion of specific agency regulations.

WHEN: Tuesday, December 11, 2012
9 a.m.–12:30 p.m.

WHERE: Office of the Federal Register
Conference Room, Suite 700
800 North Capitol Street, NW.
Washington, DC 20002

RESERVATIONS: (202) 741–6008

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Reader Aids

Consult the Reader Aids section at the end of this page for phone numbers, online resources, finding aids, reminders, and notice of recently enacted public laws.

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CFR PARTS AFFECTED IN THIS ISSUE

A cumulative list of the parts affected this month can be found in the Reader Aids section at the end of this issue.

Rules and Regulations

Federal Register
Vol. 77, No. 229
Wednesday, November 28, 2012

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 101

[Docket No. FDA–2000–N–0011]

Uniform Compliance Date for Food Labeling Regulations

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA or we) is establishing January 1, 2016, as the uniform compliance date for food labeling regulations that are issued between January 1, 2013, and December 31, 2014. We periodically announce uniform compliance dates for new food labeling requirements to minimize the economic impact of label changes. On December 15, 2010, we established January 1, 2014, as the uniform compliance date for food labeling regulations issued between January 1, 2011, and December 31, 2012.

DATES: This rule is effective November 28, 2012. Submit electronic or written comments by January 28, 2013.

ADDRESSES: You may submit comments, identified by Docket No. FDA–2000–N–0011, by any of the following methods:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

Written Submissions

Submit written submissions in the following ways:

- *FAX:* 301–827–6870.
- *Mail/Hand delivery/Courier (for paper or CD–ROM submissions):* Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Instructions: All submissions received must include the Agency name and Docket No. FDA–2000–N–0011 for this rulemaking. All comments received may be posted without change to *http://www.regulations.gov,* including any personal information provided. For additional information on submitting comments, see the ''Comments'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Paul L. Ferrari, Center for Food Safety and Applied Nutrition (HFS–24), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740, 240–402–1722.

SUPPLEMENTARY INFORMATION:

I. Background

FDA periodically issues regulations requiring changes in the labeling of food. If the effective dates of these labeling changes were not coordinated, the cumulative economic impact on the food industry of having to respond separately to each change would be substantial. Therefore, we periodically have announced uniform compliance dates for new food labeling requirements (see, e.g., the **Federal Register** of October 19, 1984 (49 FR 41019); December 24, 1996 (61 FR 67710); December 27, 1996 (61 FR 68145); December 23, 1998 (63 FR 71015); November 20, 2000 (65 FR 69666); December 31, 2002 (67 FR 79851); December 21, 2006 (71 FR 76599); December 8, 2008 (73 FR 74349); and December 15, 2010 (75 FR 78155). Use of a uniform compliance date provides for an orderly and economical industry adjustment to new labeling requirements by allowing sufficient lead time to plan for the use of existing label inventories and the development of new labeling materials. This policy serves consumers' interests as well because the cost of multiple short-term label revisions that would otherwise occur would likely be passed on to consumers in the form of higher prices.

We have determined under 21 CFR 25.30(k) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

This final rule contains no collections of information. Therefore, clearance by the Office of Management and Budget under the Paperwork Reduction Act of 1995 is not required.

We have examined the impacts of the final rule under Executive Order 12866, Executive Order 13563, the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4). Executive Orders 12866 and 13563 direct Agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). We believe that this final rule is not a significant regulatory action under Executive Order 12866.

The establishment of a uniform compliance date does not in itself lead to costs or benefits. We will assess the costs and benefits of the uniform compliance date in the regulatory impact analyses of the labeling rules that take effect at that date.

The Regulatory Flexibility Act requires Agencies to analyze regulatory options that would minimize any significant economic impact of a rule on small entities. Because the final rule does not impose compliance costs on small entities, FDA certifies that the final rule will not have a significant economic impact on a substantial number of small entities.

Section 202(a) of the Unfunded Mandates Reform Act of 1995 requires that Agencies prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing ''any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000

or more (adjusted annually for inflation) in any one year.'' The current threshold after adjustment for inflation is $139 million, using the most current (2011) Implicit Price Deflator for the Gross Domestic Product. We do not expect this final rule to result in any 1-year expenditure that would meet or exceed this amount.

We have analyzed this final rule in accordance with the principles set forth in Executive Order 13132. We have determined that the rule does not contain policies that have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Accordingly, we have concluded that the rule does not contain policies that have federalism implications as defined in the Executive Order and, consequently, a federalism summary impact statement is not required.

This action is not intended to change existing requirements for compliance dates contained in final rules published before January 1, 2013. Therefore, all final rules published by FDA in the **Federal Register** before January 1, 2013, will still go into effect on the date stated in the respective final rule.

We generally encourage industry to comply with new labeling regulations as quickly as feasible, however. Thus, when industry members voluntarily change their labels, it is appropriate that they incorporate any new requirements that have been published as final regulations up to that time.

In rulemaking that began with publication of a proposed rule on April 15, 1996 (61 FR 16422), and ended with a final rule on December 24, 1996, we provided notice and an opportunity for comment on the practice of establishing uniform compliance dates by issuance of a final rule announcing the date. Receiving no comments objecting to this practice, we find any further rulemaking unnecessary for establishment of the uniform compliance date. Nonetheless, under 21 CFR 10.40(e)(1), we are providing an opportunity for comment on whether this uniform compliance date should be modified or revoked.

The new uniform compliance date will apply only to final FDA food labeling regulations that require changes in the labeling of food products and that publish after January 1, 2013, and before December 31, 2014. Those regulations will specifically identify January 1, 2016, as their compliance date. All food products subject to the January 1, 2016, compliance date must comply with the appropriate regulations when initially introduced into interstate commerce on or after January 1, 2016. If any food labeling regulation involves special circumstances that justify a compliance date other than January 1, 2016, we will determine for that regulation an appropriate compliance date, which will be specified when the final regulation is published.

II. Comments

Interested persons may submit either written comments regarding this document to the Division of Dockets Management (see **ADDRESSES**) or electronic comments to *http://www.regulations.gov.* It is only necessary to send one set of comments. Identify comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday, and will be posted to the docket at *http://www.regulations.gov.*

Dated: November 20, 2012.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2012–28817 Filed 11–27–12; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 127

[Docket No. USCG–2011–0227]

RIN 1625–AB67

Reconsideration of Letters of Recommendation for Waterfront Facilities Handling LNG and LHG

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: This final rule clarifies the role and purpose of the Letter of Recommendation (LOR) issued by the Coast Guard Captain of the Port regarding the suitability of a waterway for liquefied natural gas (LNG) or liquefied hazardous gas (LHG) marine traffic. It also establishes a separate process for reconsideration of LORs by the Coast Guard. The process applies only to LORs issued after the effective date of the rule.

DATES: This final rule is effective December 28, 2012.

ADDRESSES: Comments and material received from the public, as well as documents mentioned in this preamble as being available in the docket, are part of docket USCG–2011–0227 and are available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. You may also find this docket on the Internet by going to *http://www.regulations.gov* and inserting ''USCG–2011–0227'' in the ''Search'' box.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Mr. Ken Smith (CG–OES–2), U.S. Coast Guard; telephone (202) 372–1413, email *Ken.A.Smith@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION:

Table of Contents for Preamble

I. Abbreviations

APA Administrative Procedure Act
CFR Code of Federal Regulations
COTP Captain of the Port
DHS Department of Homeland Security
FERC Federal Energy Regulatory Commission
FR **Federal Register**
LHG Liquefied hazardous gas
LNG Liquefied natural gas
LOI Letter of Intent
LOR Letter of Recommendation
NEPA National Environmental Policy Act of 1969
NPRM Notice of proposed rulemaking
Pub. L. Public Law
PWSA Ports and Waterways Safety Act of 1972, as amended
U.S.C. United States Code

II. Regulatory History

On December 16, 2011, we published a notice of proposed rulemaking (NPRM) entitled ''Reconsideration of Letters of Recommendation for Waterfront Facilities Handling LNG and LHG'' in the **Federal Register** (76 FR

78188). We received two letters commenting on the proposed rule. No public meeting was requested and none was held.

III. Basis and Purpose

Under existing regulations contained in 33 CFR part 127, an owner or operator intending to build a new waterfront facility handling liquefied natural gas (LNG) or liquefied hazardous gas (LHG), or planning new construction to expand or modify marine terminal operations in an existing waterfront facility that would result in an increase in the size and/or frequency of LNG or LHG marine traffic on the waterway associated with the proposed facility or modification to an existing facility, must submit a Letter of Intent (LOI) to the Captain of the Port (COTP) of the zone in which the facility is or will be located. The COTP then issues, to the Federal, State, or local government agencies having jurisdiction for siting, construction, and operation of the facility, a Letter of Recommendation (LOR) as to the suitability of the waterway for LNG or LHG marine traffic related to the facility.

The Coast Guard issues LORs pursuant to the authority of the Ports and Waterways Safety Act of 1972, as amended (PWSA) (33 U.S.C. 1221 *et seq.*). Section 813 of the Coast Guard Authorization Act of 2010 also directs the Coast Guard to make a recommendation to the Federal Energy Regulatory Commission (FERC) as to the suitability of marine traffic associated with a proposed waterside LNG facility (Pub. L. 111–281, 124 Stat. 2905, 2999) (Oct. 15, 2010), and the LOR meets that requirement. This rule clarifies the role and purpose of the LOR, and establishes a separate process for reconsideration of LORs issued by the Coast Guard. This clarification and establishment of a new process are necessary because of confusion caused in part by the past practice of reconsidering LORs using the appeals process set forth in 33 CFR 127.015. We issue this final rule under the authority of the statutes already described, as well as Department of Homeland Security Delegation No. 0170.1 and 33 CFR subpart 1.05.

IV. Background

As described above, the Coast Guard issues an LOR in response to an LOI received from an owner or operator intending to build a new waterfront facility handling LNG or LHG, or planning new construction to expand or modify marine terminal operations in an existing facility that would result in an increase in the size and/or frequency of LNG or LHG marine traffic on the waterway associated with the proposed facility or modification to an existing facility. The LOR is intended to provide an expert, unbiased recommendation as to whether the waterway and port infrastructure can safely and securely support the anticipated marine traffic associated with the new or modified facility.

Prior to May 2010, the COTP issued the LOR to the owner or operator of the facility as well as to the State and local government agencies with jurisdiction. However, in 2010 the Coast Guard changed that process in a final rule updating the LOI and LOR regulations (''Revision of LNG and LHG Waterfront Facility General Requirements,'' 75 FR 29420 (May 26, 2010)). Currently, the Coast Guard issues the LOR to the Federal, State, or local government agency having jurisdiction for siting, construction, and operation of the waterfront facility (referred to in this document as the ''jurisdictional agency''), and sends a copy to the owner or operator of the proposed facility. The majority of recent LOR recipients have been facilities handling LNG, and FERC is the jurisdictional agency with exclusive authority to approve or deny an application for the siting, construction, expansion, and operation of an LNG terminal. FERC has incorporated into its regulations the Coast Guard's requirement that the facility owner or operator submit an LOI (33 CFR 127.007), making submission of the LOI to the Coast Guard a required element of the facility owner or operator's application for FERC approval (18 CFR 157.21(a)(1)). Following the receipt of the facility owner or operator's LOI, the COTP issues the LOR to FERC, as part of FERC's public comment and decision making process, as a function of the Coast Guard's subject matter expertise (33 CFR 127.009). Unlike the LOI, the LOR is not a pre-filing or a permitting requirement under FERC regulations, and is not a required element of the facility owner or operator's application to FERC. The LOR is the Coast Guard's ''comment'' on FERC's proposed action.

Several issued LORs have invited the recipient to request reconsideration of the LOR pursuant to 33 CFR 127.015, which provides that ''[a]ny person directly affected by an action taken under this part may request reconsideration by the Coast Guard officer responsible for that action.'' The process set forth in § 127.015 is the same that an owner or operator would use to appeal agency actions described elsewhere in Part 127, such as a COTP's Order to suspend operations. The use of § 127.015 to request reconsideration of LORs, however, has led to confusion about the nature and proper role of the LOR. This is in part because use of the words ''action'' and ''final agency action'' in § 127.015 create confusion as to whether the LOR is an agency action for purposes of the Administrative Procedure Act (APA) (5 U.S.C. 551 *et seq.*). While we believe LORs should be subject to internal Coast Guard review, we did not intend to suggest that an LOR is an agency action, or that the LOR conveys a right or obligation.

As we explained in the NPRM, the LOR is not an ''agency action'' as that term is defined by the APA or understood in the context of enforceable legal actions. To constitute agency action for purposes of the APA, an activity must constitute, in whole or in part, an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act (5 U.S.C. 551(13)). The LOR is none of these. The LOR neither entitles nor forbids an owner or operator to construct or modify an LNG or LHG facility. The Coast Guard has no authority to site or license waterfront facilities handling LNG or LHG. Rather, the Coast Guard provides its LOR to an agency that does have that authority—the jurisdictional agency—to inform that agency's review of the siting, construction, or operation of a facility. The LOR is a recommendation, and is not legally enforceable on or by any agency or person, including the Coast Guard.

As discussed above, we believe that some of the past confusion regarding the nature of LORs stems from the Coast Guard's use of 33 CFR 127.015 for LOR reconsiderations. The process in § 127.015 is designed for appeals of agency actions taken under the authority of Part 127,[1] and using that same process for internal reconsideration of LORs inadvertently caused confusion between the two. In particular, § 127.015 applies to ''[a]ny person directly affected by an action taken under this part,'' and using that language in reference to an unenforceable recommendation is inapt.

The Coast Guard seeks to resolve the resulting confusion and, further, believes the process in § 127.015 is inappropriately complicated and lengthy in light of the LOR's role as a recommendation to another agency in the context of that agency's permitting

[1] The Coast Guard does take agency action with respect to LNG and LHG facilities when it enforces its rules addressing the operation, maintenance, personnel training, firefighting, and security of the marine transfer area of waterfront facilities that handle LNG or LHG cargos, and when the COTP issues an Order directing vessel operations. See the detailed discussion in the NPRM (76 FR 78189).

process. The LOR is intended to inform the jurisdictional agency's process, and therefore should be available to the jurisdictional agency early in that process. A reconsideration process that results in revisions to the LOR after the jurisdictional agency's decision does not serve the purpose of the LOR.

V. Discussion of Comments and Changes

The Coast Guard received two letters commenting on this proposed rulemaking: one from the Attorney General for the State of Rhode Island, and one from the Rhode Island Department of Environmental Management. Both commenters expressed the opinion that issuance of an LOR constitutes an agency action under the APA, and one expressed the opinion that the issuance of an LOR is a major federal action that triggers the environmental impact analysis requirements of the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370h). The Coast Guard disagrees with these comments.

Pursuant to the Natural Gas Act, as amended, FERC possesses the *exclusive* authority to approve or deny an application for the siting, construction, expansion, and operation of a waterfront LNG facility (see 15 U.S.C. 717b(e)). Similarly, for proposals to site, construct, expand, or operate a waterfront LHG facility, the agency with jurisdiction (Federal, State, or local) over the project possesses approval authority. The agency with jurisdiction over the proposed action of siting, constructing, or operating the waterfront LNG or LHG facility serves as the lead agency responsible for complying with the applicable environmental review requirements.

Issuance of an LOR is not an ''action'' by the Coast Guard under the APA or NEPA. The LOR is not the functional equivalent of a permit or a form of permission that substantively affects a license, nor is it a ''determination'' that can be enforced. The Coast Guard has no jurisdiction to authorize the siting, construction, and operation of waterfront LNG and LHG facilities. Jurisdictional agencies, such as FERC, are not required to issue or deny a license or other authorization based on the recommendations contained in an LOR, or impose any recommended mitigation measures as terms of the authorization, even where the LOR is required. The Coast Guard has no authority over the content of the jurisidictional agency's license or permit. Although the Coast Guard is required to provide recommendations to FERC under section 813 of the Coast Guard Authorization Act of 2010, (Pub. L. 111–281, 124 Stat. 2905, 2999 (Oct. 15, 2010)), FERC is not prohibited from issuing an order without having received a Coast Guard recommendation. For these reasons, the LOR does not ''substantively affect'' a license or licensing process as suggested by the commenters. The LOR merely provides information for the jurisdictional agency to consider in its own deliberative process.

Furthermore, issuing an LOR neither authorizes nor prohibits vessel transit to or from the LNG or LHG facility. If safety or security concerns prompted the Coast Guard to address vessel operations near the facility, the Coast Guard Captain of the Port (COTP) would do so in a COTP order; that COTP order would be issued pursuant to specific authority granted by the Ports and Waterways Safety Act (PWSA) (33 U.S.C. 1221 *et seq.*) that is wholly independent of, and does not rely on or enforce, an LOR. To interpret the LOR as a Federal agency action under the APA would impermissibly detract from the jurisdictional agency's authority to license the siting, construction, and operation of LNG and LHG waterfront facilities.

Issuing an LOR is not a major Federal action that triggers an independent duty to prepare an environmental impact analysis under NEPA. NEPA requires FERC, as the responsible official for the permitting process, to consult with agencies that have special expertise with respect to any environmental impact involved (42 U.S.C. 4332(C)). There is no requirement, however, that the agency consulted prepare a separate environmental impact statement (42 U.S.C. 4332; see also 40 CFR 1501.5). The Coast Guard, as an agency with subject matter expertise in matters affecting the safety and security of the waterway, serves as a cooperating agency to the jurisdictional agency (see 40 CFR 1501.6). In this role as a cooperating agency, and in accordance with 33 CFR Part 127, the Coast Guard makes its recommendation as to the suitability of the waterway to the Federal, State, or local government agency with jurisdiction. This recommendation, communicated in the LOR, is a document to be used in the jurisdictional agency's permitting process. There is no requirement that it independently comply with NEPA or other environmental compliance statutes.

For the reasons explained above, the LOR is not an ''agency action'' under the APA or a major Federal action under NEPA. The Coast Guard has made no change to the proposed rule in response to the comments received.

The Coast Guard did change the rule by adding the words ''Indian tribal government'' to the list of entities that may request reconsideration of the LOR pursuant to the revised § 127.009(c), with conforming changes in revised § 127.009(d). As we explained in our NPRM, new § 127.009(c) is intended to provide opportunity for additional discussion with governmental entities in the vicinity of the facility who may have unique information about the safety and security of the waterway (76 FR 78190). In our NPRM we provided notice and opportunity for public comment on this optional participation of local government entities in the reconsideration process. Like State and local governments, Indian tribal governments in the vicinity of a facility may be able to provide unique information regarding safety and security issues affecting the suitability of certain waterways, and logically would be included among the entities that may choose to request reconsideration. Adding Indian tribal governments to the list of entities will avoid any ambiguity as to their inclusion, and does not alter the intent or expected effect of the rule.

Separately, the Coast Guard slightly reworded new § 127.010(c)(1) for clarity. Both changes are nonsubstantive clarifications for which prior notice and public comment is unnecessary under 5 U.S.C. 553(b)(B).

VI. Regulatory Analyses

We developed this rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analyses based on these statutes or executive orders.

A. Regulatory Planning and Review

Executive Orders 12866 (''Regulatory Planning and Review'') and 13563 (''Improving Regulation and Regulatory Review'') direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This final rule has not been designated a ''significant regulatory action'' under section 3(f) of Executive Order 12866. Accordingly, the final rule has not been

reviewed by the Office of Management and Budget.

We received no public comments from industry and we received no additional information or data that would alter our assessment of the NPRM. Therefore, we adopt the Preliminary Regulatory Analysis for the NPRM as final. A summary of the analysis follows:

This rule clarifies the role and purpose of the LORs issued by the Coast Guard COTP regarding the suitability of a waterway for LNG or LHG marine traffic. It also provides a separate process for LOR reconsideration for facility owners or operators and State, local, or Indian tribal government in the vicinity of the facility. If an LNG or LHG facility owner or operator or State, local, or Indian tribal government were to seek reconsideration of an LOR, a written request would be sent to the COTP who issued the LOR, and a copy would be sent to the jurisdictional agency. The process applies only to LORs issued after the effective date of the rule.

We do not expect this rule to impose new regulatory costs on the LNG/LHG industry because an LNG or LHG facility owner or operator and State, local, or Indian tribal government in the vicinity of the facility will only request reconsideration if it does not agree with the recommendation. The option to request reconsideration of an LOR has been an industry practice for several years. Since 2007, there has been an average of about three requests for reconsiderations annually. As previously discussed, this rule replaces the existing process for reconsideration with the process in new § 127.010, and applies to new LORs issued after the effective date of the rule, not to LORs already issued. For these reasons, no change in either the burden or the frequency of requests is projected as a result of this rulemaking. Although market conditions may change in the future, the Coast Guard does not have any data to indicate the receipt of new requests for reconsideration of LORs within the foreseeable future.

B. Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this rule would have a significant economic impact on a substantial number of small entities. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard received no comments from the Small Business Administration on this rule.

Large corporations own the existing waterfront LNG facilities, and we expect this type of ownership to continue in the future. This type of ownership also exists for the approximately 159 LHG facilities operating in the United States. In addition, as stated above, the Coast Guard does not expect a change in either the burden or the frequency of requests as a result of this rulemaking. Therefore, the Coast Guard certifies under 5 U.S.C. 605(b) that this final rule will not have a significant economic impact on a substantial number of small entities.

C. Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we offered to assist small entities in understanding the rule so that they could better evaluate its effects on them and participate in the rulemaking. The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1 (888) 734–3247).

D. Collection of Information

This rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

E. Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this rule under that Order and have determined that it does not have implications for federalism.

F. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 (adjusted for inflation) or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

G. Taking of Private Property

This rule will not cause a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

H. Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

I. Protection of Children

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not create an environmental risk to health or risk to safety that may disproportionately affect children.

J. Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments. This rule does give Indian tribal governments in the vicinity of the facility the option to request reconsideration of Coast Guard LORs for that facility, but it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

K. Energy Effects

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a ''significant energy action'' under that order because it is not a ''significant regulatory action'' under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not

require a Statement of Energy Effects under Executive Order 13211.

L. Technical Standards

The National Technology Transfer and Advancement Act (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

M. Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA)(42 U.S.C. 4321–4370h), and have concluded that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves creating a separate process for reconsideration of LORs and is categorically excluded under section 2.B.2, figure 2–1, paragraph (34)(a) of the Instruction, which includes regulations that are editorial or procedural, such as those updating addresses or establishing application procedures. An environmental analysis checklist and a categorical exclusion determination are available in the docket where indicated under the **ADDRESSES** section of this preamble.

List of Subjects in 33 CFR Part 127

Fire prevention, Harbors, Hazardous substances, Natural gas, Reporting and recordkeeping requirements, Security measures.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 127 as follows:

PART 127—WATERFRONT FACILITIES HANDLING LIQUEFIED NATURAL GAS AND LIQUEFIED HAZARDOUS GAS

■ 1. The authority citation for part 127 continues to read as follows:

Authority: 33 U.S.C. 1231; 46 U.S.C. Chapter 701; Department of Homeland Security Delegation No. 0170.1.

■ 2. Revise § 127.009 to read as follows:

§ 127.009 Letter of recommendation.

(a) After the COTP receives the Letter of Intent under § 127.007(a) or (b), the COTP issues a Letter of Recommendation (LOR) as to the suitability of the waterway for LNG or LHG marine traffic to the Federal, State, or local government agencies having jurisdiction for siting, construction, and operation, and, at the same time, sends a copy to the owner or operator, based on the—

(1) Information submitted under § 127.007;

(2) Density and character of marine traffic in the waterway;

(3) Locks, bridges, or other man-made obstructions in the waterway;

(4) Following factors adjacent to the facilitysuch as—

(i) Depths of the water;

(ii) Tidal range;

(iii) Protection from high seas;

(iv) Natural hazards, including reefs, rocks, and sandbars;

(v) Underwater pipelines and cables;

(vi) Distance of berthed vessel from the channel and the width of the channel; and

(5) Any other issues affecting the safety and security of the waterway and considered relevant by the Captain of the Port.

(b) An LOR issued under this section is a recommendation from the COTP to the agency having jurisdiction as described in paragraph (a), and does not constitute agency action for the purposes of § 127.015 or the Administrative Procedure Act (5 U.S.C. 551 *et seq.*).

(c) The owner or operator, or a State, local, or Indian tribal government in the vicinity of the facility, may request reconsideration as set forth in § 127.010.

(d) Persons other than the owner or operator, or State, local, or Indian tribal government in the vicinity of the facility, may comment on the LOR by submitting comments and relevant information to the agency having jurisdiction, as described in paragraph (a), for that agency's consideration in its permitting process.

(e) Paragraphs (c) and (d) of this section apply to LORs issued after December 28, 2012. For LORs issued prior to that date, persons requesting reconsideration must follow the process set forth in § 127.015.

■ 3. Add § 127.010 to read as follows:

§ 127.010 Reconsideration of the Letter of Recommendation.

(a) A person requesting reconsideration pursuant to § 127.009(c) must submit a written request to the Captain of the Port (COTP) who issued the Letter of Recommendation (LOR), and send a copy of the request to the agency to which the LOR was issued. The request must explain why the COTP should reconsider his or her recommendation.

(b) In response to a request described in paragraph (a) of this section, the COTP will do one of the following—

(1) Send a written confirmation of the LOR to the agency to which the LOR was issued, with copies to the person making the request and the owner or operator; or

(2) Revise the LOR, and send the revised LOR to the agency to which the original LOR was issued, with copies to the person making the request and the owner or operator.

(c) A person whose request for reconsideration results in a confirmation as described in paragraph (b)(1) of this section, and who is not satisfied with that outcome, may request, in writing, the opinion of the District Commander of the district in which the LOR was issued.

(1) The request must explain why the person believes the District Commander should instruct the COTP to reconsider his or her recommendation.

(2) A person making a request under paragraph (c) of this section must send a copy of the request to the agency to which the LOR was issued.

(3) In response to the request described in this paragraph (c), the District Commander will do one of the following—

(i) Send a written confirmation of the LOR to the agency to which the LOR was issued, with copies to the person making the request, the owner or operator, and the COTP; or

(ii) Instruct the COTP to reconsider the LOR, and send written notification of that instruction to the agency to which the original LOR was issued, with copies to the person making the request and the owner or operator.

(d) The District Commander's written confirmation described in paragraph (c)(3)(i) of this section ends the reconsideration process with respect to that specific request for reconsideration. If the COTP issues an LOR pursuant to paragraph (b)(2) or (c)(3)(ii) of this section, persons described in

§ 127.009(c) may request reconsideration of that revised LOR using the process beginning in paragraph (a) of this section.

Dated: November 14, 2012.

J.G. Lantz,

Director of Commercial Regulations and Standards, U.S. Coast Guard.

[FR Doc. 2012–28794 Filed 11–27–12; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2012–0945]

RIN 1625–AA00

Safety Zone; Bay Bridge Construction, San Francisco Bay, San Francisco, CA

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone in the navigable waters of the San Francisco Bay near Yerba Buena Island, CA in support of the Bay Bridge Construction Safety Zone from November 1, 2012 through July 31, 2013. This safety zone is being established to protect mariners transiting the area from the dangers associated with over-head construction operations. Unauthorized persons or vessels are prohibited from entering into, transiting through, or remaining in the safety zone without permission of the Captain of the Port or their designated representative.

DATES: This rule is effective with actual notice from 12:01 a.m. on November 1, 2012 through November 28, 2012. This rule is effective in the **Federal Register** from November 28, 2012 until 11:59 p.m. on July 31, 2013.

ADDRESSES: Documents mentioned in this preamble are part of docket USCG–2012–0945. To view documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* type the docket number in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rulemaking. You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary rule, call or email Ensign William Hawn, U.S. Coast Guard Sector San Francisco; telephone (415) 399–7442 or email at *D11-PF-MarineEvents@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION:

Table of Acronyms

DHS Department of Homeland Security
FR **Federal Register**
NPRM Notice of Proposed Rulemaking

A. Regulatory History and Information

The Coast Guard is issuing this final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.''

Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because publishing an NPRM would be impracticable. The Coast Guard received notification of the load transfer operations on September 25, 2012 and the event would occur before the rulemaking process would be completed. Because of the dangers posed by over-head construction of the Bay Bridge, the safety zone is necessary to provide for the safety of mariners transiting the area.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. For the reasons stated above, delaying the effective date would be impracticable.

B. Basis and Purpose

The legal basis for the proposed temporary rule is the Ports and Waterways Safety Act which authorizes the Coast Guard to establish safety zones (33 U.S.C. 1221 et seq.).

CALTRANS will sponsor the Bay Bridge Construction Safety Zone on November 1, 2012 through July 31, 2013, in the navigable waters of the San Francisco Bay near Yerba Buena Island, CA. Construction is scheduled to take place from 12:01 a.m. on November 1, 2012 until 11:59 p.m. on July 31, 2013. Upon commencement of the over-head construction for the Self-Anchored Suspension Span, the safety zone will encompass the navigable waters of the San Francisco Bay within a box connected by the following points: 37°49′06″ N, 122°21′17″ W; 37°49′01″ N, 122°21′12″ W; 37°48′48″ N, 122°21′35″ W; 37°48′53″ N, 122°21′40″ W (NAD 83). The construction is necessary to facilitate the completion of the Bay Bridge project. The Bay Bridge is constructed using a self-anchoring suspension system that requires frequent installation and removal of false work on and around the bridge. A safety zone is needed to establish a temporary limited access area on the waters surrounding the load transfer operation. A safety zone is necessary to protect mariners transiting the area from the dangers associated with the construction of the Bay Bridge Self-Anchoring Suspension Span.

C. Discussion of the Final Rule

The Coast Guard is establishing a safety zone in navigable waters around and under the Bay Bridge within a box connected by the following points: 37°49′06″ N, 122°21′17″ W; 37°49′01″ N, 122°21′12″ W; 37°48′48″ N, 122°21′35″ W; 37°48′53″ N, 122°21′40″ W (NAD 83) during construction operations. Construction on the Self-Anchoring Suspension Span is scheduled to take place from 12:01 a.m. on November 1, 2012 until 11:59 p.m. on July 31, 2013. At the conclusion of the construction operations the safety zone shall terminate. The Captain of the Port San Francisco (COTP) will notify the maritime community of periods during which this zone will be enforced via Broadcast Notice to Mariners in accordance with 33 CFR 165.7.

The effect of the temporary safety zone will be to restrict navigation in the vicinity of the construction operations. Except for persons or vessels authorized by the Coast Guard Patrol Commander, no person or vessel may enter or remain in the restricted area.

D. Regulatory Analyses

We developed this rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analyses based on 13 of these statutes and executive orders.

1. Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, as supplemented by Executive Order 13563, Improving Regulation and Regulatory Review, and does not require an assessment of

potential costs and benefits under section 6(a)(3) of that Executive Order 12866 or under section 1 of Executive Order 13563. The Office of Management and Budget has not reviewed it under those Orders.

We expect the economic impact of this rule does not rise to the level of necessitating a full Regulatory Evaluation. The safety zone is limited in duration, and is limited to a narrowly tailored geographic area. In addition, although this rule restricts access to the waters encompassed by the safety zone, the effect of this rule will not be significant because the local waterway users will be notified via public Broadcast Notice to Mariners to ensure the safety zone will result in minimum impact. The entities most likely to be affected are waterfront facilities, commercial vessels, and pleasure craft engaged in recreational activities.

2. Impact on Small Entities

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, as amended, requires federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. This rule may affect the following entities, some of which may be small entities: O wners and operators of waterfront facilities, commercial vessels, and pleasure craft engaged in recreational activities and sightseeing, if these facilities or vessels are in the vicinity of the safety zone at times when this zone is being enforced. This rule will not have a significant economic impact on a substantial number of small entities for the following reasons: (i) This rule will encompass only a small portion of the waterway for a limited period of time, (ii) vessel traffic can transit safely around the safety zone, and (iii) the maritime public will be advised in advance of this safety zone via Broadcast Notice to Mariners.

3. Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Public Law 104–121), we want to assist small entities in understanding this rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT**, above.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

4. Collection of Information

This rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

5. Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this rule under that Order and have determined that it does not have implications for federalism.

6. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places or vessels.

7. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 (adjusted for inflation) or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

8. Taking of Private Property

This rule will not cause a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

9. Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

10. Protection of Children

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not create an environmental risk to health or risk to safety that may disproportionately affect children.

11. Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

12. Energy Effects

This action is not a ''significant energy action'' under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use.

13. Technical Standards

This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

14. Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves a safety zone of limited size and duration. This rule is categorically excluded from further review under paragraph 34(g) of Figure 2–1 of the Commandant

Instruction. An environmental analysis checklist supporting this determination and a Categorical Exclusion Determination are available in the docket where indicated under **ADDRESSES**. We seek any comments or information that may lead to the discovery of a significant environmental impact from this rule.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, and Waterways.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add § 165.T11–534 to read as follows:

§ 165.T11–534 Safety zone; Bay Bridge Construction, San Francisco Bay, San Francisco, CA.

(a) *Location.* This temporary safety zone is established in the navigable waters of the San Francisco Bay near Yerba Buena Island, California as depicted in National Oceanic and Atmospheric Administration (NOAA) Chart 18650. The safety zone will encompass the navigable waters of the San Francisco Bay within a box connected by the following points: 37°49′06″ N, 122°21′17″ W; 37°49′01″ N, 122°21′12″ W; 37°48′48″ N, 122°21′35″ W; 37°48′53″ N, 122°21′40″ W (NAD 83).

(b) *Enforcement Period.* The zone described in paragraph (a) of this section will be in effect from 12:01 a.m. on November 1, 2012 until 11:59 p.m. on July 31, 2013. The Captain of the Port San Francisco (COTP) will notify the maritime community of periods during which this zone will be enforced via Broadcast Notice to Mariners in accordance with 33 CFR 165.7.

(c) *Definitions.* As used in this section, ''designated representative'' means a Coast Guard Patrol Commander, including a Coast Guard coxswain, petty officer, or other officer on a Coast Guard vessel or a Federal, State, or local officer designated by or assisting the COTP in the enforcement of the safety zone.

(d) *Regulations.* (1) Under the general regulations in 33 CFR part 165, Subpart C, entry into, transiting or anchoring within this safety zone is prohibited unless authorized by the COTP or a designated representative.

(2) The safety zone is closed to all vessel traffic, except as may be permitted by the COTP or a designated representative.

(3) Vessel operators desiring to enter or operate within the safety zone must contact the COTP or a designated representative to obtain permission to do so. Vessel operators given permission to enter or operate in the safety zone must comply with all directions given to them by the COTP or a designated representative. Persons and vessels may request permission to enter the safety zone on VHF–23A or through the 24-hour Command Center at telephone (415) 399–3547.

Dated: November 2, 2012.

Cynthia L. Stowe,

Captain, U.S. Coast Guard, Acting, Captain of the Port San Francisco.

[FR Doc. 2012–28792 Filed 11–27–12; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 17

RIN 2900–AO47

Authorization for Non-VA Medical Services

AGENCY: Department of Veterans Affairs.

ACTION: Direct final rule.

SUMMARY: The Department of Veterans Affairs (VA) is taking direct final action to amend its regulation governing payment by VA for non-VA outpatient care under VA's statutory authority to provide non-VA care. Under this authority, VA may contract for certain hospital care (inpatient care) and medical services (outpatient care) for eligible veterans when VA facilities are not capable of providing such services due to geographical inaccessibility or are not capable of providing the services needed. This amendment revises VA's existing regulation in accordance with statutory authority to remove a limitation on which veterans are eligible for medical services under this authority.

DATES: This final rule is effective on January 28, 2013, without further notice, unless VA receives a significant adverse comment by December 28, 2012.

ADDRESSES: Written comments may be submitted through *www.Regulations.gov;* by mail or hand-delivery to the Director, Regulation Policy and Management (02REG), Department of Veterans Affairs, 810 Vermont Ave. NW., Room 1068, Washington, DC 20420; or by fax to (202) 273–9026. This is not a toll-free number. Comments should indicate that they are submitted in response to ''RIN 2900–AO47—Authorization for Non-VA Medical Services.'' Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1068, between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 461–4902 for an appointment. This is not a toll-free number. In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at *www.Regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Lisa Brown, Chief, Policy Management Department, Department of Veterans Affairs, Chief Business Office, Purchased Care, 3773 Cherry Creek North Drive, Suite 450, Denver, CO 80209 at (303) 331–7829. This is not a toll-free number.

SUPPLEMENTARY INFORMATION:

Over the past two decades, the healthcare industry has increasingly emphasized providing care in the least restrictive environment. Care that was provided in hospitals is now provided with a full range of outpatient and ambulatory care options previously unavailable. VA has adopted this trend toward outpatient and ambulatory care and, whenever possible, provides treatment options to veterans in these less restrictive modes of healthcare delivery. Although VA has made great strides to expand the delivery of healthcare to veterans, VA is, like the rest of the healthcare industry, economically unable to provide all possible services at all VA-operated venues of care. VA addresses this in part by authorizing non-VA care when necessary to meet the veteran's plan of care.

VA uses the authority in 38 U.S.C. 1703 to provide certain hospital care and medical services to eligible veterans when VA facilities are not capable of providing such services due to geographical inaccessibility or are not capable of providing the services needed, ensuring the continuity of care for the patient and the maximization of healthcare resources. VA may use this authority to provide needed non-VA care using community resources, such as private physicians or community hospitals. Care provided under VA's authority in 38 U.S.C. 1703 is usually referred to as the Non-VA Care program.

Non-VA care enables VA to maximize resources and available options for patient care at the local level, providing care in the least restrictive mode possible and closer to the patient's home.

Public Law 104–262, 104(b)(2)(B) amended 38 U.S.C. 1703(a)(2)(B) to expand VA's authority to provide non-VA medical services under the non-VA care authority. As amended, the law authorizes VA to provide such medical services for a veteran who has been furnished hospital care, nursing home care, domiciliary care, or medical services and who requires medical services to complete treatment incident to such care or services.

At present, 38 CFR 17.52(a)(2)(ii) provides that ''[a] veteran who has received VA inpatient care for treatment of nonservice-connected conditions for which treatment was begun during the period of inpatient care'' is eligible for non-VA medical services under the non-VA care authority. The existing VA regulation does not reflect the amendment made by Public Law 104–262 to 38 U.S.C. 1703(a)(2)(B). This VA regulation thus does not permit VA to complete a veteran's treatment through non-VA providers under the non-VA care authority unless the VA treatment was begun during a period of hospitalization.

VA is amending its regulation at 38 CFR 17.52(a)(2)(ii) to reflect the current statutory authority found at 38 U.S.C. 1703(a)(2)(B). In doing so, VA will increase the availability of care in areas where VA cannot directly provide the care. Paragraph (a)(2)(ii) of this revised regulation provides that veterans who have been furnished hospital care, nursing home care, domiciliary care, or medical services, and who require medical services to complete treatment incident to such care or services, are eligible for non-VA medical services under the non-VA care authority. By expanding veterans' eligibility for non-VA care, VA will be able to better utilize resources and enhance patient care at the local level. This regulation will give VA greater flexibility to refer patients for care in the least restrictive and most convenient setting.

This revision to § 17.52(a)(2)(ii) clarifies the time period during which veterans are eligible to receive non-VA care to complete their treatments. Currently, § 17.52(a)(2)(ii) states that the non-VA care treatment period, which includes ''care furnished in both facilities of VA and non-VA facilities or any combination of such modes of care,'' is limited to no more than 12 months after the veteran is discharged from the hospital, unless VA determines that the veteran requires continued non-VA care ''by virtue of the disabilities being treated.'' This revision clarifies that each authorization for non-VA care needed to complete treatment may continue for up to 12 months, and that VA may issue new authorizations as needed. The requirement to issue a new authorization gives VA an opportunity to determine whether non-VA care continues to be the appropriate means of providing the veteran's treatment.

We note that this amendment only affects the eligibility of certain veterans for medical services provided by a non-VA provider under the non-VA care authority in 38 U.S.C. 1703; this amendment does not require providers outside of VA to accept VA patients. We also note that this amendment does not affect other provisions in this regulation that specify veterans' eligibility for non-VA care.

Administrative Procedure Act

VA believes this rule is non-controversial, anticipates that this rule will not result in any significant adverse comment and, therefore, is issuing this regulatory amendment as a direct final rule. Previous actions of this nature, which remove restrictions on VA medical benefits to improve health outcomes, have not been controversial and have not resulted in significant adverse comments or objections. However, in the ''Proposed Rules'' section of the **Federal Register**, VA is publishing a separate, substantially identical proposed rule that will serve as a proposal for the provisions in this direct final rule in the event that any significant adverse comment is received by VA. (See RIN 2900–AO46.)

For purposes of the direct final rulemaking, a significant adverse comment is one that explains why the rule would be inappropriate, including challenges to the rule's underlying premise or approach, or why it would be ineffective or unacceptable without change. If VA receives a significant adverse comment, VA will publish a notice of receipt of a significant adverse comment in the **Federal Register** and withdraw the direct final rule. In determining whether an adverse comment is significant and warrants withdrawing a direct final rule, we will consider whether the comment raises an issue serious enough to warrant a substantive response in a notice-and-comment process in accordance with section 553 of the Administrative Procedure Act (5 U.S.C. 553). Comments that are frivolous, insubstantial, or outside the scope of the rule will not be considered adverse under this procedure. For example, a comment recommending an additional change to the rule will not be considered a significant comment unless the comment states why the rule would be ineffective or unacceptable without the additional change.

Under direct final rule procedures, if no significant adverse comment is received within the comment period, this rule will become effective on the date specified above. After the close of the comment period, VA will publish a document in the **Federal Register** indicating that VA received no significant adverse comment and restating the date on which the final rule will become effective. VA will also publish a notice in the **Federal Register** withdrawing the proposed rule, RIN 2900–AO46.

In the event that VA withdraws the direct final rule because of receipt of any significant adverse comment, VA will proceed with the rulemaking by addressing the comments received and publishing a final rule. The comment period for the proposed rule runs concurrently with that of the direct final rule. VA will treat any comments received in response to the direct final rule as comments regarding the proposed rule. VA will consider such comments in developing a subsequent final rule. Likewise, VA will consider any significant adverse comment received in response to the proposed rule as a comment regarding the direct final rule. VA has determined that it is not necessary to provide a 60-day comment period for this rulemaking that would merely align a current regulation with existing statutory authority and make a minor modification concerning determination of the time period during which veterans are eligible to receive non-VA care to complete their treatments. VA has instead specified that comments must be received within 30 days of publication in the **Federal Register**.

Effect of Rulemaking

Title 38 of the Code of Federal Regulations, as revised by this rulemaking, represents VA's implementation of its legal authority on this subject. Other than future amendments to this regulation or governing statutes, no contrary guidance or procedures are authorized. All existing or subsequent VA guidance must be read to conform with this rulemaking if possible or, if not possible, such guidance is superseded by this rulemaking.

Paperwork Reduction Act

This final rule contains no provisions constituting a collection of information

under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521).

Regulatory Flexibility Act

The Secretary hereby certifies that this regulatory amendment will not have a significant economic impact on a substantial number of small entities as defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. This rule affects only VA beneficiaries and does not affect a substantial number of small entities. Because this rule updates an existing regulation to make it consistent with existing statutory authority and reflect current and long-standing VA practices, VA anticipates no additional expenditures or actions as a result of this rule. Therefore, under 5 U.S.C. 605(b), this rulemaking is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 12866 (Regulatory Planning and Review) defines a ''significant regulatory action'' requiring review by the Office of Management and Budget (OMB) as ''any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order.''

The economic, interagency, budgetary, legal, and policy implications of this regulatory action have been examined, and it has been determined not to be a significant regulatory action under Executive Order 12866.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in expenditures by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more, adjusted annually for inflation, in any one year. This final rule will have no such effect on State, local, and tribal governments, or on the private sector.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance numbers and titles for the programs affected by this document are 64.007, Blind Rehabilitation Centers; 64.008, Veterans Domiciliary Care; 64.009, Veterans Medical Care Benefits; 64.010, Veterans Nursing Home Care; 64.011, Veterans Dental Care; 64.012, Veterans Prescription Service; 64.013, Veterans Prosthetic Appliances; 64.014, Veterans State Domiciliary Care; 64.015, Veterans State Nursing Home Care; 64.018, Sharing Specialized Medical Resources; 64.019, Veterans Rehabilitation Alcohol and Drug Dependence; 64.022, Veterans Home Based Primary Care; and 64.024, VA Homeless Providers Grant and Per Diem Program.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. John R. Gingrich, Chief of Staff, Department of Veterans Affairs, approved this document on November 19, 2012, for publication.

List of Subjects in 38 CFR Part 17

Administrative practice and procedure, Alcohol abuse, Alcoholism, Claims, Day care, Dental health, Drug abuse, Government contracts, Grant programs—health, Government programs—veterans, Health care, Health facilities, Health professions, Health records, Homeless, Mental health programs, Nursing homes, Reporting and recordkeeping requirements, Veterans.

Dated: November 21, 2012.

Robert C. McFetridge,

Director, Regulation Policy and Management, Office of the General Counsel, Department of Veterans Affairs.

For the reasons stated in the preamble, the Department of Veterans Affairs amends 38 CFR part 17 as follows:

PART 17—MEDICAL

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 38 U.S.C. 501, and as noted in specific sections.

■ 2. Revise § 17.52(a)(2)(ii) to read as follows:

§ 17.52 Hospital care and medical services in non-VA facilities.

(a) * * *

(2) * * *

(ii) A veteran who has been furnished hospital care, nursing home care, domiciliary care, or medical services, and requires medical services to complete treatment incident to such care or services (each authorization for non-VA treatment needed to complete treatment may continue for up to 12 months, and new authorizations may be issued by VA as needed), and

* * * * *

[FR Doc. 2012–28778 Filed 11–27–12; 8:45 am]

BILLING CODE 8320–01–P

POSTAL SERVICE

39 CFR Part 111

New Marking Standards for Parcels Containing Hazardous Materials

AGENCY: Postal Service™.

ACTION: Final rule.

SUMMARY: The Postal Service is revising *Mailing Standards of the United States Postal Service,* Domestic Mail Manual (DMM®) 601.10 to adopt new mandatory marking standards for parcels containing mailable hazardous material that will align with the revised requirements provided by the Department of Transportation (DOT). This revision also provides terminology and categorization changes needed to respond to the pending elimination of the ''Other Regulated Material'' (ORM–D) category and the partial elimination of the ''consumer commodity'' category by the DOT.

DATES: Effective January 1, 2013.

FOR FURTHER INFORMATION CONTACT: Kevin Gunther at 202–268–7208.

SUPPLEMENTARY INFORMATION: The Postal Service will revise DMM 601.10, and

make corresponding revisions to Publication 52, *Hazardous, Restricted, and Perishable Mail,* chapters 2, 3 and 7, and Appendices A and C, to adopt new marking standards for parcels containing mailable hazardous materials. In August 2012, these marking standards were added to the DMM for optional-use by mailers and supplement the previously authorized DMM marking standards for parcels containing mailable hazardous materials.

With this revision, the Postal Service will require the use of these markings on parcels intended for air and surface transportation. However, the new markings standards will be deferred for parcels intended for surface transportation to coincide with the delayed implementation date for ground transportation provided by the DOT. The new standards, including proposed implementation dates, are summarized below.

Mailers should note that any other marking or documentation requirements not specifically referenced in this final rule, including the preparation of a properly completed shipper's declaration, will not be modified or eliminated by any of the revisions described herein. It should also be noted that the adoption of these new standards is not intended to expand or limit the mailable materials or quantities previously permitted under the ORM–D category.

Background

On January 19, 2011, the DOT's Pipeline and Hazardous Materials Safety Administration (PHMSA) published final rule HM–215K (76 FR 3308–3389), which harmonized the requirements of the U.S. Hazardous Materials Regulations (HMR) with international transport requirements. In its **Federal Register** final rule, PHMSA signaled its intent to, among other things, eliminate the ''Other Regulated Material'' (ORM–D) classification for all forms of transportation. This change will become effective on January 1, 2013, for shipments intended for air transportation and on January 1, 2015, for shipments intended for surface transportation.

In addition to the elimination of the ORM–D category, PHMSA also eliminates the ''consumer commodity'' category for products in hazard Classes 4, 5, and 8, as well as a portion of hazard Class 9, for all shipments intended for air transportation. This change will become effective on January 1, 2013. After this date, the mailability of materials previously falling within the ''consumer commodity'' category must be evaluated based on its eligibility under the limited quantity category in the HMR.

PHMSA expects that the alignment of the existing limited quantity provisions in the HMR with international standards and regulations will enhance safety by facilitating a single uniform system of transporting limited quantity materials. Because of the inherent risk unique to air transportation, PHMSA believes that full harmonization with the International Civil Aviation Organization Technical Instructions (ICAO TI) is necessary with regard to the materials authorized and the guidelines for limited quantities (including consumer commodities) intended for transport by air. The ICAO TI also include specific provisions for air transport of dangerous goods in the mail, which are much more restrictive than the general standards. No dangerous goods are allowed in international mail, with the exception of certain infectious substances, certain patient specimens and certain radioactive materials as noted in section 135 of *Mailing Standards of the United States Postal Service,* International Mail Manual (IMM®); these materials may be sent only by authorized mailers for authorized purposes.

On August 6, 2012, based on the regulations provided by PHMSA in its January 19, 2011, **Federal Register** final rule, the Postal Service revised the DMM to incorporate optional marking standards for parcels containing mailable hazardous materials. These standards provided that mailers could optionally use new marking standards consistent with the new DOT marking requirements, or continue to use the previous USPS® marking standards.

On October 3, 2012, the Postal Service published a proposed rule in the **Federal Register** (77 FR 60334–60339) to announce its proposal for new mailing standards to align with PHMSA regulations provided in the January 19, 2011, notice. The Postal Service received comments in response to this proposed rule, which are summarized later in this notice.

Air Transport Standards for January 1, 2013

The Postal Service will align its hazardous materials mailing requirements with those of PHMSA by requiring the marking standards described in this final rule on all parcels intended for air transportation. Effective January 1, 2013, the optional marking standards for parcels containing mailable hazardous materials described in the August 6, 2012, DMM revision will become mandatory for materials intended for air transportation.

Effective January 1, 2013, the Postal Service will begin to categorize hazardous materials meeting the current definition of a mailable ORM–D material within hazard Classes 4, 5, or 8, and portions of 9, using the description ''mailable limited quantity;'' and will retain the description ''consumer commodity'' for all other mailable hazard classes. The Postal Service will also revise the DMM to replace the current ORM–D category for parcels containing materials intended for air transportation with the applicable ''consumer commodity'' or the new ''mailable limited quantity'' categories.

Mailpieces containing currently authorized air-eligible consumer commodities (ORM–D–AIR) within DOT Class 2.2 (nonflammable, nontoxic gasses), Class 3 (flammable and combustible liquids), Class 6.1 (toxic substances), and Class 9 (miscellaneous) will be reclassified under hazard Class 9 (miscellaneous) instead of their previous ''ORM–D–AIR'' classification. Mailpieces containing this material will also be required to bear the proper shipping name ''Consumer Commodity,'' the Identification Number ''ID8000,'' and both the DOT square-on-point marking including the symbol ''Y'' and an approved DOT Class 9 hazardous material warning label. Mailpieces must also bear a shipper's declaration for dangerous goods.

Mailpieces containing mailable air-authorized limited quantity Class 9 materials within UN3077, UN3082, UN3334 and UN3335, will be required to bear the proper shipping name ''Consumer Commodity,'' Identification Number ''ID8000,'' and both the DOT square-on-point marking including the symbol ''Y'' and an approved DOT Class 9 hazardous material warning label. These are the only Class 9 materials authorized by the DOT to be shipped under the limited quantity classification by domestic air transportation.

Effective January 1, 2013, the Postal Service will also require the use of other DOT hazardous warning labels on packages intended for air transportation, which contain materials that meet the current definition of a mailable ORM–D material in hazard Class 5.1 (oxidizing substances), hazard Class 5.2 (organic peroxides) and hazard Class 8 (corrosives). The DOT will no longer define a consumer commodity category for these particular hazard classes. Similarly, the DOT will not define a consumer commodity in hazard Class 4 (flammable solids); however this will not have an impact for USPS mailers

because the Postal Service does not currently permit hazard class 4 materials in its air transportation networks. These mailpieces will also be required to bear the proper shipping name and Identification Number, as identified in Publication 52 Appendix A, both DOT square-on-point marking (including the symbol ''Y''), and the appropriate approved DOT hazardous material warning label. Mailpieces must also bear a shipper's declaration for dangerous goods.

Before January 1, 2015, mailable hazardous materials intended for surface transportation will continue to be classified using the ORM–D categorization. Until that time, mailers will have the option of continuing to use the current ''ORM–D'' marking for materials intended for ground transportation, or using the new DOT-authorized ''square-on-point'' limited quantity marking on parcels containing mailable hazardous materials.

Surface Transport Standards for January 1, 2015

The Postal Service plans to implement the final segment of its alignment with PHMSA by eliminating the optional ORM–D markings and categorization for hazardous materials intended for surface transportation on January 1, 2015. The use of ORM–D markings will no longer be permitted for use with any materials being tendered for transport within USPS networks, either by surface or air. After this date, all mailpieces containing hazardous materials will be required to be marked using the appropriate DOT square-on-point marking.

With this revision, mailable limited quantity and mailable consumer commodity materials, when tendered to the Postal Service, must bear an approved DOT square-on-point marking. The use of additional DOT hazardous material warning labels will not be required or permitted on parcels intended for transportation in USPS ground networks.

Comments

The Postal Service received three comments in response to the October 3, 2012, proposed rule, with some commenters addressing more than a single issue. All commenters were generally in support of the Postal Service's actions to align with DOT regulations in regards to the mailing of hazardous materials. These comments are summarized as follows:

Comment: One commenter questions why the Postal Service would agree to adopt PHMSA regulations, provided in 49 *Code of Federal Regulations* (CFR) into their mailing standards when the Postal Service claims to be regulated by 39 CFR.

Response: Although Postal Service mailing standards are provided in 39 CFR, the Postal Service attempts to maintain consistency with 49 CFR whenever possible. Generally, Postal Service mailing standards are more restrictive than those provided in 49 CFR, and include many additional limitations and prohibitions not applicable to commercial carriers. One benefit of the Postal Service's alignment with PHMSA is that it will provide for consistency in the marking requirements for hazardous materials, whether transported through the Postal Service or a commercial carrier. Another benefit to the alignment with PHMSA regulations is the adoption of common categorization and terminology. The Postal Service expects that the use of terminology common to both the DOT and USPS will improve the processing and consistency of rulings on the mailability of hazardous materials and will make these rulings more consistent.

Comment: A commenter asks if the Postal Service intends to provide appropriate labeling, marking, and packaging material.

Response: Although the Postal Service provides mailing supplies and packaging for customer use with some postal products, it generally does not provide supplies expressly for the purpose of mailing hazardous materials. The Postal Service does not intend to modify its current policy as a result of the changes described in this notice.

Comment: A commenter states that the DMM revisions provided by the Postal Service in its October 3, 2012 proposed rule are inconsistent with Publication 52, as it relates to the mailability of UN3175, *solids containing flammable liquids,* materials. The commenter notes that Publication 52 limits the mailing of these materials only to surface transportation.

Response: The Postal Service agrees and has chosen not to provide an option for air transportation of these materials. The Postal Service has revised its proposed standards accordingly. Qualifying UN3175 materials may still be shipped via USPS surface transportation.

Comment: A commenter states that the mailing standards provided in the October 3, 2012, proposed rule incorrectly imply that all hazardous materials in hazard Classes 2.2, 3, 6.1, and 9 are eligible to be reclassified under Class 9 and permitted to bear the ID8000 identification number, when being shipped through the Postal Service. The commenter recommends revised language to clarify that this option is applicable only to articles or substances that meet the definition of a consumer commodity in hazard Class 2 (non-toxic aerosols only), Class 3 (packing group II and III only), Division 6.1 (packing group III only), or UN3077 and UN3082 materials that do not have subsidiary risk and are authorized aboard passenger aircraft.

Response: It was not the intent of the Postal Service to either limit or expand the group of hazardous materials presently mailable by air transportation. The Postal Service believes that use of the language recommended by the commenter would limit the mailability of some materials currently accepted for air transportation. However, the Postal Service agrees with the commenter that further clarification is necessary to specify that only certain materials and quantities are eligible for air transportation in USPS networks. Therefore, the Postal Service will modify the October 3, 2012, proposed language to specify that only mailable air-eligible consumer commodity materials can be tendered to the Postal Service for air transportation.

Comment: A commenter expressed concern that the regulations provided by PHMSA in its January 19, 2011, **Federal Register** final rule relates a false impression that all hazard Class 3, 6.1 and 9 materials, including lithium batteries would be eligible to be reclassified under hazard Class 9 and permitted to bear the ID8000 identification number.

Response: Without commenting on the objective of PHMSA relative to the transport of lithium batteries, the Postal Service intends to continue to provide standards unique to the mailing of lithium batteries and solid carbon dioxide (dry ice) and will not provide an option for mailers to classify or mark parcels containing lithium batteries or dry ice as ID8000 materials.

Comment: A commenter states that the Postal Service's January 1, 2015, proposed implementation date for the surface transportation portion of these standards is premature. This commenter states that the HMR allows for materials to classified and marked as ORM–D for surface transportation until December 31, 2013, and that PHMSA has only proposed to extend the required date for these regulations until January 1, 2015.

Response: This commenter is correct in that PHMSA has only proposed to delay their implementation until January 1, 2015, however the Postal Service expects the extension of their implementation date to be adopted. The Postal Service views the timeline for implementation of the standards

relating to surface transportation to be less critical than those for air transportation and has proposed a January 1, 2015, implementation date as the most likely to correspond with the actual PHMSA effective date. However, the Postal Service expects to be able to implement its standards relating to surface transportation either before or after PHMSA's implementation date without significant issues.

Implementation

The applicable standards contained in this final rule are effective on January 1, 2013, and will be incorporated into the DMM on January 27, 2013, corresponding with the previously scheduled price change update.

The Postal Service adopts the following changes to *Mailing Standards of the United States Postal Service,* Domestic Mail Manual (DMM), which is incorporated by reference in the *Code of Federal Regulations.* See 39 CFR part 111.1.

List of Subjects in 39 CFR Part 111

Administrative practice and procedure, Postal Service.

Accordingly, 39 CFR part 111 is amended as follows:

PART 111—[AMENDED]

■ 1. The authority citation for 39 CFR part 111 continues to read as follows:

Authority: 5 U.S.C. 552(a); 13 U.S.C. 301–307; 18 U.S.C. 1692–1737; 39 U.S.C. 101, 401, 403, 404, 414, 416, 3001–3011, 3201–3219, 3403–3406, 3621, 3622, 3626, 3632, 3633, and 5001.

■ 2. Revise the following sections of *Mailing Standards of the United States Postal Service,* Domestic Mail Manual (DMM), as follows:

Mailing Standards of the United States Postal Service, Domestic Mail Manual (DMM)

* * * * *

600 Basic Standards for All Mailing Services

601 Mailability

* * * * *

10.0 Hazardous Materials

10.1 Definitions

The following definitions apply:

* * * * *

[Revise 10.1c as follows:]

c. *ORM–D (Other Regulated Material) material* is a limited quantity of a hazardous material that presents a limited hazard during transportation due to its form, quantity, and packaging. Not all hazardous materials permitted to be shipped as a limited quantity can qualify as an ORM–D material. The ORM–D category is only applicable for materials intended for ground transportation. Effective January 1, 2015, the ORM–D category will be eliminated for materials intended for surface transportation. After this date, the mailability of materials previously fitting the description of ORM–D must be evaluated based on its eligibility under the applicable consumer commodity or mailable limited quantity categories.

[Revise 10.1d, Consumer Commodity, by adding a new last sentence as follows:]

d. * * * The consumer commodity category will not apply to materials, intended for air transportation, in hazard classes 4, 5, and 8, and portions of hazard Class 9.

[Re-sequence the current 10.1e through 10.1i as the new 10.1f through 10.1j, and add a new item 10.1e as follows:]

e. *Mailable Limited Quantity* is a hazardous material in hazard Classes 4, 5, 8 or portions of 9 that presents a limited hazard during transportation (specifically air transport), and is mailable in USPS air networks under certain conditions and in limited quantities.

* * * * *

10.3 USPS Standards for Hazardous Material

[Revise 10.3 as follows:]

The USPS standards generally restrict the mailing of hazardous materials to ORM–D (permitted for surface transportation only until January 1, 2015), and consumer commodity or mailable limited quantity materials that meet USPS quantity limitations and packaging requirements. All exceptions are subject to the standards in 10.0. Detailed information on the mailability of specific hazardous materials is contained in Publication 52, *Hazardous, Restricted, and Perishable Mail.*

* * * * *

10.4 Hazard Class

* * * * *

EXHIBIT 10.4 DOT HAZARD CLASSES AND MAILABILITY SUMMARY

Class	Hazard class name and division	Transportation method		
		Domestic mail air transportation	Domestic mail surface transportation	International mail

* * * * *

[Revise text for hazard Classes 2 and 3, under the ''Domestic Mail Air Transportation'' column (only) as follows:]

2	**Gases** Division— 2.1 Flammable Gases 2.2 Nonflammable, Nontoxic Gases 2.3 Toxic Gases	*Division 2.1 and 2.3:* Prohibited. *Division 2.2:* Only mailable air-eligible Consumer Commodity materials per 10.12.2.		
3	**Flammable and Combustible Liquids**	*Flammable liquids:* Prohibited. *Combustibles:* Only mailable air-eligible Consumer Commodity materials per 10.13.3.		

* * * * *

[Revise text for hazard Classes 5 and 6, under the ''Domestic Mail Air Transportation'' column (only) as follows:]

5	**Oxidizing Substances, Organic Peroxides** Division— 5.1 Oxidizing Substances 5.2 Organic Peroxides	Only air-eligible Mailable Limited Quantity materials per 10.15.2.		
6	**Toxic Substances and Infectious Substances** Division— 6.1 Toxic Substances 6.2 Infectious Substances	*Division 6.1:* Only mailable air-eligible Consumer Commodity materials per 10.16.2. *Division 6.2:* Only per 10.17.		

* * * * *

[Revise text for hazard Class 8, under the ''Domestic Mail Air Transportation'' column (only) as follows:]

8	**Corrosives**	Only Mailable Limited Quantity materials per 10.19.2.		

[Revise text for hazard Class 9, under the ''Hazard Class Name and Division'' and ''Domestic Mail Air Transportation'' columns (only) as follows:]

9	**Miscellaneous Hazardous Materials** ID8000 materials UN3077, UN3082, UN3334, or UN3335 materials	Only mailable air-eligible Consumer Commodity materials per 10.20.		

* * * * *

10.7 Warning Labels for Hazardous Materials

[Revise 10.7 as follows:]

With few exceptions as noted in these standards, most hazardous materials acceptable for mailing fall within the current Other Regulated Materials (ORM–D) regulations of 49 CFR 173.144 for materials intended for surface transportation, and the consumer commodity or mailable limited quantity categories for materials intended for air transportation. Mailpieces containing mailable hazardous materials intended for transportation by air are required to bear an approved DOT square-on-point marking under 10.8b and may also be required to bear a specific DOT hazardous material warning label (if required for the hazard class shipped). Mailpieces containing mailable hazardous materials must be marked as required in 10.8 and must bear DOT handling labels (e.g., orientation arrows, magnetized materials) when applicable. Effective January 1, 2015, the ORM–D category will be eliminated for materials intended for surface transportation, and mailpieces containing hazardous materials intended for surface transportation will be required to be marked using the appropriate DOT square-on-point marking. Also after this date, the mailability of materials previously fitting the description of ORM–D must be evaluated based on its eligibility under the applicable consumer commodity or mailable limited quantity categories.

10.8 Package Markings for Hazardous Materials

[Revise 10.8 as follows:]

Unless otherwise noted, each mailpiece containing a mailable hazardous material must be plainly and durably marked on the address side with the required shipping name and UN identification number. Mailpieces containing mailable air-eligible hazardous materials intended for air transportation must bear a DOT limited quantity square-on-point marking under 8b. Mailpieces containing mailable hazardous materials intended for surface transportation may be entered and marked under the ORM–D category before January 1, 2015. After this date, all parcels containing mailable hazardous materials must bear the appropriate DOT square-on-point marking and other associated markings when required. The following also applies:

a. The use of DOT limited quantity square-on-point markings are required for mailpieces intended for air transportation and optional (until January 1, 2015) for mailpieces intended for surface transportation (see Exhibit 10.8b). The plain square-on-point marking is used for shipments sent by surface transportation, and the square-on-point marking including the symbol ''Y'' superimposed in the center is used for shipments sent by air transportation. The following also applies:

1. Markings must be durable, legible and readily visible.

2. The marking must be applied on at least one side or one end of the outer packaging. The border forming the square-on-point must be at least 2 mm (0.08 inch) in width and the minimum dimension of each side must be 100 mm (3.94 inches), unless the package size requires a reduced size marking of no less than 50 mm (1.97 inches) on each side.

3. For surface transportation, the top and bottom portions of the square-on-point and the border forming the square-on-point must be black and the center must be white or of a suitable contrasting background. Surface shipments containing qualifying ORM–D materials and bearing the square-on-point limited quantity marking are not required to be marked with the shipping name and identification number.

4. For transportation by aircraft, the top and bottom portions of the square-on-point and the border forming the square-on-point must be black and the center must be white or of a suitable contrasting background. The symbol ''Y'' must be black and located in the center of the square-on-point and be clearly visible. Mailpieces intended for transport by air must also be marked with the proper shipping name, identification number, and must also display the appropriate DOT hazardous material warning label (only when required for the hazard class shipped) in accordance with Publication 52.

b. The UN identification number is not required on mailpieces containing ORM–D materials and intended for surface transportation. A mailable ORM–D material must be marked on the address side with ''ORM–D'' (or marked under 10.8a) immediately following, or below the proper shipping name. The proper shipping name for a mailable ORM–D material is ''consumer commodity.'' The designation ''ORM–D'' must be placed within a rectangle that is approximately 6.3 mm (¼ inch) larger on each side than the applicable designation. Mailpieces containing ORM–D materials sent as Standard Mail, Parcel Post, Parcel Select, or Package Services must also be marked on the address side as ''Surface Only'' or ''Surface Mail Only.''

* * * * *

10.9 Shipping Papers for Hazardous Materials

* * * Shipping papers are required as follows:

* * * * *

[Revise 10.9a and 10.9b to update product references as follows:]

a. *Air transportation requirements.* Except for nonregulated materials sent under 10.17.3 or 10.17.8 and diagnostic specimens sent under 10.17.5, mailpieces containing mailable hazardous materials sent as Express Mail, Priority Mail, First-Class Mail, or First-Class Package Service, must include a shipping paper.

b. *Surface transportation requirements.* Except for nonregulated materials sent under 10.17.3 or 10.17.8 and mailable ORM–D materials, mailpieces containing mailable hazardous materials sent as Standard Mail, Parcel Post, Parcel Select, or Package Services, must include a shipping paper.

10.10 Air Transportation Prohibitions for Hazardous Materials

[Revise the introductory paragraph of 10.10 to update product references as follows:]

All mailable hazardous materials sent as Express Mail, Priority Mail, First-Class Mail, or First-Class Package Service, must meet the requirements for air transportation. The following types of hazardous materials are always prohibited on air transportation regardless of class of mail:

* * * * *

10.12 Gases (Hazard Class 2)

* * * * *

10.12.2 Mailability

[Revise the third and fourth sentences of 10.12.2 as follows:]

* * * Flammable gases in Division 2.1 are prohibited in domestic mail via air transportation but are permitted via surface transportation if the material can qualify as an ORM–D material (or after January 1, 2015, a consumer commodity material) and meet the standards in 10.12.3 and 10.12.4. Mailable nonflammable gases in Division 2.2 are generally permitted in the domestic mail via air or surface transportation if the material can qualify as an ORM–D material when intended for surface transportation, or as a consumer commodity material when intended for air transportation, and also meet the standards in 10.12.3 and 10.12.4.

* * * * *

10.12.4 Marking

[Revise the second sentence and add a new third sentence for 10.12.4 as follows:]

* * * For air transportation, packages must bear the DOT square-on-point marking including the symbol ''Y,'' an approved DOT Class 9 hazardous material warning label, Identification Number ''ID8000,'' and the proper shipping name ''Consumer Commodity.'' Mailpieces must also bear a shipper's declaration for dangerous goods.

10.13 Flammable and Combustible Liquids (Hazard Class 3)

* * * * *

10.13.2 Flammable Liquid Mailability

[Revise the third sentence of the introductory paragraph of 10.13.2 as follows:]

* * * Other flammable liquid is prohibited in domestic mail via air transportation but is permitted via surface transportation if the material can qualify as an ORM–D material (or after January 1, 2015, a consumer commodity material) and meet the following conditions as applicable:

[Revise 10.13.2a and 2b as follows:]

a. The flashpoint is above 20 °F (−7 °C) but no more than 73 °F (23 °C); the liquid is in a metal primary receptacle not exceeding 1 quart, or in another type of primary receptacle not exceeding 1 pint, per mailpiece; enough cushioning surrounds the primary receptacle to absorb all potential leakage; the cushioning and primary receptacle are packed within a securely sealed secondary container that is placed within a strong outer shipping container; and each mailpiece is plainly and durably marked on the address side with ''Surface Only'' or ''Surface Mail Only'' and ''ORM–D'' immediately following or below the proper shipping name (or with a DOT square-on-point marking under 10.8b).

b. The flashpoint is above 73 °F (23 °C) but less than 100 °F (38 °C); the liquid is in a metal primary receptacle not exceeding 1 gallon, or in another type of primary receptacle not exceeding 1 quart, per mailpiece; enough cushioning surrounds the primary receptacle to absorb all potential leakage; the cushioning and primary receptacle are placed within a securely sealed secondary container that is placed within a strong outer shipping container; and each mailpiece is plainly and durably marked on the address side with ''Surface Only'' or ''Surface Mail Only'' and ''ORM–D'' immediately following or below the proper shipping name (or with a DOT square-on-point marking under 10.8b).

10.13.3 Combustible Liquid Mailability

[Revise the second sentence of the introductory paragraph of 10.13.3 as follows:]

* * * Combustible liquid is permitted in domestic mail if the material can qualify as an ORM–D material, when intended for ground transportation or a consumer commodity material, when intended for air transportation, and when the following conditions are met as applicable:

[Revise 10.13.3a as follows:]

a. For surface transportation, if the flashpoint is 100 °F (38 °C) but no more than 141 °F (60.5 °C); the liquid is in a metal primary receptacle not exceeding 1 gallon, or in another type of primary receptacle not exceeding 1 quart, per mailpiece; enough cushioning surrounds the primary receptacle to absorb all potential leakage; the cushioning and primary receptacle are packed in a securely sealed secondary container that is placed within a strong outer shipping container; and each mailpiece is plainly and durably marked on the address side with ''Surface Only'' or ''Surface Mail Only'' and ''ORM–D'' immediately following or below the

proper shipping name (or with a DOT square-on-point marking under 10.8b).

[Revise 10.13.3b as follows:]

b. For surface or air transportation, if the flashpoint is above 141 °F (60.5 °C) but no more than 200 °F (93 °C); the liquid is in a primary receptacle not exceeding 1 gallon per mailpiece; enough cushioning surrounds the primary receptacle to absorb all potential leakage; the cushioning and primary receptacle are packed in a securely sealed secondary container that is placed within a strong outer shipping container. For surface transportation, each mailpiece must be plainly and durably marked on the address side with ''ORM–D'' immediately following or below the proper shipping name; and each piece must be marked on the address side as ''Surface Only'' or ''Surface Mail Only'' (or with a DOT square-on-point marking under 10.8b). For air transportation, packages must bear the DOT square-on-point marking including the symbol ''Y,'' an approved DOT Class 9 hazardous material warning label, Identification Number ''ID8000,'' the proper shipping name ''Consumer Commodity,'' and a shipper's declaration for dangerous goods.

* * * * *

10.14 Flammable Solids (Hazard Class 4)

* * * * *

10.14.2 Mailability

[Revise the last sentence of 10.14.2 as follows:]

* * * A flammable solid that can qualify as an ORM–D material (or after January 1, 2015, a mailable limited quantity material) is permitted in domestic mail via surface transportation if the material is contained in a secure primary receptacle having a weight of 1 pound or less; the primary receptacle(s) is packed in a strong outer shipping container with a total weight of 25 pounds or less per mailpiece; and each mailpiece is plainly and durably marked on the address side with ''Surface Only'' or ''Surface Mail Only'' and ''ORM–D'' immediately following or below the proper shipping name (or with a DOT square-on-point marking under 10.8b).

* * * * *

10.15 Oxidizing Substances, Organic Peroxides (Hazard Class 5)

* * * * *

10.15.2 Mailability

[Revise 10.15.2 as follows:]

Oxidizing substances and organic peroxides are prohibited in international mail. Class 5 materials are permitted in domestic mail if the material can qualify as an ORM–D material (until January 1, 2015), when intended for ground transportation; or an air-eligible mailable limited quantity material, when intended for air transportation. Liquid materials must be enclosed within a primary receptacle having a capacity of 1 pint or less; the primary receptacle(s) must be surrounded by absorbent cushioning material and held within a leak-resistant secondary container that is packed within a strong outer shipping container. Solid materials must be contained within a primary receptacle having a weight capacity of 1 pound or less; the primary receptacle(s) must be surrounded with cushioning material and packed within a strong outer shipping container. Each mailpiece may not exceed a total weight of 25 pounds. For surface transportation, each mailpiece must be plainly and durably marked on the address side with ''ORM–D'' immediately following or below the proper shipping name; and each piece must be marked on the address side as ''Surface Only'' or ''Surface Mail Only'' (or with a DOT square-on-point marking under 10.8b). For air transportation, packages must bear the DOT square-on-point marking including the symbol ''Y,'' the appropriate approved DOT Class 5.1 or 5.2 hazardous material warning label, the identification number, the proper shipping name, and a shipper's declaration for dangerous goods.

10.16 Toxic Substances (Hazard Class 6, Division 6.1)

* * * * *

10.16.2 Mailability

[Revise the second sentence of 10.16.2 as follows:]

* * * For domestic mail, a Division 6.1 toxic substance or poison that can qualify as an ORM–D material (until January 1, 2015) when intended for ground transportation, or a mailable air-eligible consumer commodity material when intended for air transportation, is permitted when packaged under the applicable requirements in 10.16.4.

* * *

* * * * *

10.16.4 Packaging and Marking

The following requirements must be met, as applicable:

[Revise 16.4a as follows:]

a. A toxic substance that can qualify as an ORM–D material (until January 1, 2015) when intended for ground transportation, or a mailable air-eligible consumer commodity material when intended for air transportation, and does not exceed a total capacity of 8 ounces per mailpiece is permitted if: The material is held in a primary receptacle(s); enough cushioning material surrounds the primary receptacle to absorb all potential leakage; and the cushioning and primary receptacle(s) are packed in another securely sealed secondary container that is placed within a strong outer shipping container. For surface transportation, each mailpiece must be plainly and durably marked on the address side with ''ORM–D'' immediately following or below the proper shipping name; and each piece must be marked on the address side as ''Surface Only'' or ''Surface Mail Only'' (or with a DOT square-on-point marking under 10.8b). For air transportation, packages must bear the DOT square-on-point marking including the symbol ''Y,'' an approved DOT Class 9 hazardous material warning label, Identification Number ''ID8000,'' the proper shipping name ''Consumer Commodity,'' and a shipper's declaration for dangerous goods.

* * * * *

10.19 Corrosives (Hazard Class 8)

* * * * *

10.19.2 Mailability

[Revise the second sentence of the introductory paragraph of 10.19.2 as follows:]

* * * A corrosive that can qualify as an ORM–D material (until January 1, 2015), when intended for ground transportation; or an air-eligible mailable limited quantity material, when intended for air transportation, is permitted in domestic mail via air or surface transportation subject to these limitations:

* * * * *

10.19.3 Marking

[Revise 10.19.3 as follows:]

For surface transportation, each mailpiece must be plainly and durably marked on the address side with ''ORM–D'' immediately following or below the proper shipping name; and each piece must be marked on the address side as ''Surface Only'' or ''Surface Mail Only'' (or with a DOT square-on-point marking under 10.8b). For air transportation, packages must bear the DOT square-on-point marking including the symbol ''Y,'' the appropriate approved DOT Class 8 hazardous material warning label, the identification number, the proper shipping name, and a shipper's declaration for dangerous goods.

* * * * *

10.20 Miscellaneous Hazardous Materials (Hazard Class 9)

* * * * *

10.20.2 Mailability

[Revise the second sentence of 10.20.2 as follows:]

* * * A miscellaneous hazardous material that can qualify as an ORM–D material (until January 1, 2015) when intended for ground transportation, or a mailable air-eligible consumer commodity material when intended for air transportation, is permitted for domestic mail via air or surface transportation, subject to the applicable 49 CFR requirements.

10.20.3 Marking

[Revise 10.20.3 as follows:]

For surface transportation, the mailpiece must be plainly and durably marked on the address side with ''Surface Only'' or ''Surface Mail Only'' and ''ORM–D'' immediately following or below the proper shipping name (or with a DOT square-on-point marking under 10.8b). For air transportation, packages must bear the DOT square-on-point marking including the symbol ''Y,'' an approved DOT Class 9 hazardous material warning label, Identification Number ''ID8000,'' the proper shipping name ''Consumer Commodity,'' and a shipper's declaration for dangerous goods.

* * * * *

We will publish an appropriate amendment to 39 CFR part 111 to reflect these changes.

Stanley F. Mires,

Attorney, Legal Policy and Legislative Advice.

[FR Doc. 2012–28673 Filed 11–27–12; 8:45 am]

BILLING CODE 7710–12–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2009–0644; FRL–9366–1]

Fenpropathrin; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes tolerances for residues of fenpropathrin in or on multiple commodities which are identified and discussed later in this document. Interregional Research Project Number 4 (IR–4) requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective November 28, 2012. Objections and requests for hearings must be received on or before January 28, 2013, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2009–0644, is available at *http://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), EPA West Bldg., Rm. 3334, 1301 Constitution Ave. NW., Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Laura Nollen, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: (703) 305–7390; email address: *nollen.laura@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

B. How can I get electronic access to other related information?

You may access a frequently updated electronic version of EPA's tolerance regulations at 40 CFR part 180 through the Government Printing Office's e-CFR site at *http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?&c=ecfr&tpl=/ecfrbrowse/Title40/40tab_02.tpl.*

C. How can I file an objection or hearing request?

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2009–0644 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing, and must be received by the Hearing Clerk on or before January 28, 2013. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing (excluding any Confidential Business Information (CBI) for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit the non-CBI copy of your objection or hearing request, identified by docket ID number EPA–HQ–OPP–2009–0644, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be CBI or other information whose disclosure is restricted by statute.
- *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001.
- *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *http://www.epa.gov/dockets/contacts.htm.*

Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at *http://www.epa.gov/dockets.*

II. Summary of Petitioned-for Tolerance

In the **Federal Register** of October 7, 2009 (74 FR 51597) (FRL–8792–7), EPA issued a notice pursuant to FFDCA section 408(d)(3), 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 9E7594) by IR–4, 500 College Road East, Suite 201W, Princeton, NJ 08540. The petition requested that 40 CFR 180.466 be amended by establishing tolerances for

residues of the insecticide fenpropathrin, alpha-cyano-3-phenoxy-benzyl 2,2,3,3-tetramethylcyclopropanecarboxylate, in or on acerola, feijoa, guava, jaboticaba, passionfruit, starfruit and wax jambu at 1.5 parts per million (ppm); longan, lychee, pulasan, rambutan and Spanish lime at 3.0 ppm; atemoya, biriba, cherimoya, custard apple, ilama, soursop and sugar apple, at 1.0 ppm; and tea at 2.0 ppm. That notice referenced a summary of the petition prepared on behalf of IR–4 by Valent USA Corporation, the registrant, which is available in the docket, *http://www.regulations.gov.* There were no comments received in response to the notice of filing.

Based upon review of the data supporting the petition, EPA has revised the proposed tolerances for several commodities. The Agency has also revised the tolerance expression for all established commodities to be consistent with current Agency policy. The reasons for these changes are explained in Unit IV.C.

III. Aggregate Risk Assessment and Determination of Safety

Section 408(b)(2)(A)(i) of FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is ''safe.'' Section 408(b)(2)(A)(ii) of FFDCA defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue * * *.''

Consistent with FFDCA section 408(b)(2)(D), and the factors specified in FFDCA section 408(b)(2)(D), EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for fenpropathrin including exposure resulting from the tolerances established by this action. EPA's assessment of exposures and risks associated with fenpropathrin follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children.

Fenpropathrin is a member of the pyrethroid class of insecticides. Pyrethroids have historically been classified into two groups—Type I and Type II, based on chemical structure and toxicological effects. Type I pyrethroids induce in rats a syndrome consisting of aggressive sparring, altered sensitivity to external stimuli, hyperthermia, and fine tremors, progressing to whole-body tremors, and prostration (T-syndrome). Type II pyrethroids, which contain an alpha-cyano moiety, produce in rats a syndrome that includes pawing, burrowing, salivation, hypothermia, and coarse tremors leading to choreoathetosis (CS-syndrome). Fenpropathrin is a mixed type pyrethroid because the biochemical responses and resulting clinical signs of neurotoxicity are intermediate between those of Type I and Type II pyrethroids. The adverse outcome pathway shared by pyrethroids involves the ability to interact with voltage-gated sodium channels in the central and peripheral nervous systems, leading to changes in neuron firing and, ultimately, neurotoxicity.

Fenpropathrin exhibits high acute toxicity via the oral and dermal routes, but low toxicity via the inhalation route of exposure. Fenpropathrin is a mild eye irritant, but does not cause dermal irritation or skin sensitization. Toxicological effects characteristic of Type I pyrethroids were seen in most of the experimental toxicology studies including the acute, subchronic, and developmental neurotoxicity studies, subchronic studies in the rat and dog, the chronic carcinogenicity study in the rat, the developmental studies in the rat and rabbit, and in the 3-generation reproduction study in rats. Tremors were the most common indication of neurotoxicity; however, ataxia, increased sensitivity (e.g., heightened response) to external stimuli, convulsions, and increased auditory startle response were also observed.

In developmental toxicity studies in rats and rabbits, maternal toxicity included neurological effects such as ataxia, sensitivity to external stimuli, tremors in the rat, and flicking of forepaws in the rabbit. Developmental effects were limited to incomplete or asymmetrical ossification of sternebrae at the maternally toxic dose in the rat. There were no developmental effects in the rabbit. There were no indications of immunotoxicity in any of the guideline studies, including the immunotoxicity study in rats. In a 3-generation reproduction study in the rat, maternal and offspring effects were observed at the mid- and high-dose. At the high dose, maternal effects included increased deaths and clinical signs of toxicity (tremors, muscle twitches, and increased sensitivity) during lactation. Pup deaths were noted at this level. At the mid-dose, minimal signs of treatment-related effects were observed for both adults and pups, reducing concern for quantitative or qualitative sensitivity.

There was no evidence of carcinogenicity in either the rat or mouse long-term dietary studies, nor was there any mutagenic activity in bacteria or cultured mammalian cells. Fenpropathrin has been classified as ''not likely to be carcinogenic to humans.''

Specific information on the studies received and the nature of the adverse effects caused by fenpropathrin as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies can be found at *http://www.regulations.gov* in the document, ''Fenpropathrin. Human Health Risk Assessment for Section 3 Registration on Tropical Fruit and a Request for a Tolerance without U.S. Registration on Tea'' at pp 40–45 in docket ID number EPA–HQ–OPP–2009–0644.

B. Toxicological Points of Departure/Levels of Concern

Once a pesticide's toxicological profile is determined, EPA identifies toxicological points of departure (POD) and levels of concern to use in evaluating the risk posed by human exposure to the pesticide. For hazards that have a threshold below which there is no appreciable risk, the toxicological POD is used as the basis for derivation of reference values for risk assessment. PODs are developed based on a careful analysis of the doses in each toxicological study to determine the dose at which no adverse effects are observed (the NOAEL) and the lowest dose at which adverse effects of concern are identified (the LOAEL). Uncertainty/safety factors are used in conjunction with the POD to calculate a safe exposure level—generally referred to as a population-adjusted dose (PAD) or a reference dose (RfD)—and a safe margin

of exposure (MOE). For non-threshold risks, the Agency assumes that any amount of exposure will lead to some degree of risk. Thus, the Agency estimates risk in terms of the probability of an occurrence of the adverse effect expected in a lifetime. For more information on the general principles EPA uses in risk characterization and a complete description of the risk assessment process, see *http://www.epa.gov/pesticides/factsheets/riskassess.htm.* A summary of the toxicological endpoints for Fenpropathrin used for human risk assessment is shown in the following Table.

TABLE—SUMMARY OF TOXICOLOGICAL DOSES AND ENDPOINTS FOR FENPROPATHRIN FOR USE IN HUMAN HEALTH RISK ASSESSMENT

Exposure/scenario	Point of departure and uncertainty/safety factors	RfD, PAD for risk assessment	Study and toxicological effects
Acute dietary (General population, including children ≥ 6 years old).	Wolansky $BMDL_{1SD}$ = 5.0 mg/kg. UF_A = 10X UF_H = 10X FQPA SF = 1X	aRfD = 0.05 mg/kg/day. aPAD = 0.05 mg/kg/day.	Wolansky BMD_{1SD} = 6.4 mg/kg based on decreased motor activity.
Acute dietary (< 6 years old)	Wolansky $BMDL_{1SD}$ = 5.0 mg/kg. UF_A = 10X UF_H = 10X FQPA SF = 3X	aRfD = 0.05 mg/kg/day. aPAD = 0.017 mg/kg/day.	Wolansky BMD_{1SD} = 6.4 mg/kg based on decreased motor activity.
Chronic dietary (All populations)	Because of the rapid reversibility of the most sensitive neurotoxicity endpoint used for quantifying risks, there is no increase in hazard with increasing dosing duration. Therefore, the acute dietary endpoint is protective of the endpoints from repeat dosing studies, including chronic dietary exposures.		
Cancer (Oral, dermal, inhalation)	Fenpropathrin has been classified as "not likely to be carcinogenic to humans." Cancer risk is not of concern.		

FQPA SF = Food Quality Protection Act Safety Factor. mg/kg/day = milligram/kilogram/day. PAD = population adjusted dose (a = acute, c = chronic). RfD = reference dose. UF = uncertainty factor. UF_A = extrapolation from animal to human (interspecies). UF_H = potential variation in sensitivity among members of the human population (intraspecies). BMD = Benchmark Dose Analysis. BMD_{1SD} = dose level where effect is 1SD from control value. $BMDL_{1SD}$ = lower 95% confidence limit of the BMD value.

C. Exposure Assessment

1. *Dietary exposure from food and feed uses.* In evaluating dietary exposure to fenpropathrin, EPA considered exposure under the petitioned-for tolerances as well as all existing fenpropathrin tolerances in 40 CFR 180.466. EPA assessed dietary exposures from fenpropathrin in food as follows:

i. *Acute exposure.* Quantitative acute dietary exposure and risk assessments are performed for a food-use pesticide, if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a 1-day or single exposure. Such effects were identified for fenpropathrin. In estimating acute dietary exposure, EPA used food consumption information from the U.S. Department of Agriculture (USDA) 1994–1996 and 1998 Nationwide Continuing Surveys of Food Intake by Individuals (CSFII). As to residue levels in food, EPA utilized percent crop treated (PCT) estimates and tolerance level residues, distributions of field trial values, and distributions of Pesticide Data Program (PDP) monitoring data.

Residue distributions were used for the commodities that made the most significant contributions to the risk estimates. Distributions of USDA's PDP monitoring data from 2007 through 2010 were used for broccoli (translated to Chinese mustard cabbage and cauliflower), watermelon, squash, oranges (translated to tangerines), apples, apple juice, pears, blueberries (translated to huckleberries), grapes, grape juice, and strawberries. Distributions of field trial data were used for cherries, peaches, plums, grapefruit, raspberries, blackberries, apricots, cabbage, papaya, olives, tomatoes, cucumbers, Brussels sprouts, and guava. Tolerance-level residues were assumed for all other commodities having existing or proposed tolerances. Dietary Exposure Evaluation Model (DEEM) default processing factors were used for those commodities for which they were available. In some cases, empirical processing factors were used.

ii. *Chronic exposure.* Based on the data summarized in Unit III.A., there is no bincrease in hazard from repeated exposures to fenpropathrin; the acute dietary exposure assessment is protective for chronic dietary exposures because acute exposure levels are higher than chronic exposure levels. Accordingly, a dietary exposure assessment for the purpose of assessing chronic dietary risk was not conducted.

iii. *Cancer.* Based on the data summarized in Unit III.A., EPA has concluded that fenpropathrin does not pose a cancer risk to humans. Therefore, a dietary exposure assessment for the purpose of assessing cancer risk is unnecessary.

iv. *Anticipated residue and percent crop treated (PCT) information.* Section 408(b)(2)(E) of FFDCA authorizes EPA to use available data and information on the anticipated residue levels of pesticide residues in food and the actual levels of pesticide residues that have been measured in food. If EPA relies on such information, EPA must require pursuant to FFDCA section 408(f)(1) that data be provided 5 years after the tolerance is established, modified, or left in effect, demonstrating that the levels in food are not above the levels anticipated. For the present action, EPA will issue such data call-ins as are required by FFDCA section 408(b)(2)(E) and authorized under FFDCA section 408(f)(1). Data will be required to be submitted no later than 5 years from the date of issuance of these tolerances.

Section 408(b)(2)(F) of FFDCA states that the Agency may use data on the actual percent of food treated for assessing chronic dietary risk only if:

- Condition a: The data used are reliable and provide a valid basis to show what percentage of the food derived from such crop is likely to contain the pesticide residue.

• Condition b: The exposure estimate does not underestimate exposure for any significant subpopulation group.

• Condition c: Data are available on pesticide use and food consumption in a particular area, the exposure estimate does not understate exposure for the population in such area. In addition, the Agency must provide for periodic evaluation of any estimates used. To provide for the periodic evaluation of the estimate of PCT as required by FFDCA section 408(b)(2)(F), EPA may require registrants to submit data on PCT.

The Agency estimated the PCT for existing uses as follows:

Apples, 15%; apricots, 2.5%; blueberries, 2.5%; broccoli, 2.5%; Brussels sprouts, 10%; cabbage, 2.5%; cauliflower, 2.5%; cherries, 5%; cotton, 2.5%; cucumbers, 2.5%; grapefruit, 35%; grapes, 10%; nectarines, 2.5%; oranges, 35%; peaches, 2.5%; pears, 10%; plums, 2.5%; prune plums, 2.5%; squash, 2.5%; strawberries, 50%; tangerines, 15%; tomatoes, 10%; and watermelons, 2.5%.

In most cases, EPA uses available data from U.S. Department of Agriculture/National Agricultural Statistics Service (USDA/NASS), proprietary market surveys, and the National Pesticide Use Database for the chemical/crop combination for the most recent 6 to 7 years. EPA uses an average PCT for chronic dietary risk analysis. The average PCT figure for each existing use is derived by combining available public and private market survey data for that use, averaging across all observations, and rounding to the nearest 5%, except for those situations in which the average PCT is less than 1. In those cases, 1% is used as the average PCT and 2.5% is used as the maximum PCT. EPA uses a maximum PCT for acute dietary risk analysis. The maximum PCT figure is the highest observed maximum value reported within the recent 6 years of available public and private market survey data for the existing use and rounded up to the nearest multiple of 5%.

The Agency believes that the three conditions discussed in Unit III.C.1.iv. have been met. With respect to Condition a, PCT estimates are derived from Federal and private market survey data, which are reliable and have a valid basis. The Agency is reasonably certain that the percentage of the food treated is not likely to be an underestimation. As to Conditions b and c, regional consumption information and consumption information for significant subpopulations is taken into account through EPA's computer-based model for evaluating the exposure of significant subpopulations including several regional groups. Use of this consumption information in EPA's risk assessment process ensures that EPA's exposure estimate does not understate exposure for any significant subpopulation group and allows the Agency to be reasonably certain that no regional population is exposed to residue levels higher than those estimated by the Agency. Other than the data available through national food consumption surveys, EPA does not have available reliable information on the regional consumption of food to which fenpropathrin may be applied in a particular area.

2. *Dietary exposure from drinking water.* The Agency used screening level water exposure models in the dietary exposure analysis and risk assessment for fenpropathrin in drinking water. These simulation models take into account data on the physical, chemical, and fate/transport characteristics of fenpropathrin. Further information regarding EPA drinking water models used in pesticide exposure assessment can be found at *http://www.epa.gov/oppefed1/models/water/index.htm.*

Based on the First Index Reservoir Screening Tool (FIRST) and Screening Concentration in Ground Water (SCI–GROW) models, the estimated drinking water concentrations (EDWCs) of fenpropathrin for acute exposures are estimated to be 10.3 parts per billion (ppb) for surface water and 0.005 ppb for ground water.

Modeled estimates of drinking water concentrations were directly entered into the dietary exposure model. For acute dietary risk assessment, the water concentration value of 10.3 ppb was used to assess the contribution to drinking water.

3. *From non-dietary exposure.* The term ''residential exposure'' is used in this document to refer to non-occupational, non-dietary exposure (e.g., for lawn and garden pest control, indoor pest control, termiticides, and flea and tick control on pets). Fenpropathrin is not registered for any specific use patterns that would result in residential exposure.

4. *Cumulative effects from substances with a common mechanism of toxicity.* Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider ''available information'' concerning the cumulative effects of a particular pesticide's residues and ''other substances that have a common mechanism of toxicity.''

The Agency is required to consider the cumulative risks of chemicals sharing a common mechanism of toxicity. The Agency has determined that the pyrethroids and pyrethrins, including fenpropathrin, share a common mechanism of toxicity. The members of this group share the ability to interact with voltage-gated sodium channels, ultimately leading to neurotoxicity. The cumulative risk assessment for the pyrethroids/pyrethrins was published in the November 9, 2011 issue of the **Federal Register** (76 FR 69726) (FRL 8888–9), and is available at *http://www.regulations.gov* in the public docket, EPA–HQ–OPP–2011–0746. Further information about the determination that pyrethroids and pyrethrins share a common mechanism of toxicity may be found in document ID: EPA–HQ- OPP–2008–0489–0006.

The Agency has conducted a quantitative analysis of the proposed tolerances for fenpropathrin and has determined that it will not contribute significantly or change the overall findings presented in the pyrethroid cumulative risk assessment. In the cumulative assessment for pyrethroids, residential exposures were the greatest contributor to the total exposure. As there are no residential uses for fenpropathrin, the proposed new uses will have no impact on the residential component of the cumulative risk estimates.

Dietary exposures make a minor contribution to the total pyrethroid exposure. The dietary exposure assessment performed in support of the pyrethroid cumulative assessment was much more highly refined than that performed for the single chemical, fenpropathrin. In addition, for the fenpropathrin risk assessment, the most sensitive apical endpoint in the fenpropathrin database was selected to derive the POD. Additionally, the POD selected for fenpropathrin is specific to fenpropathrin, whereas the POD selected for the cumulative assessment was based on common mechanism of action data that are appropriate for all 20 pyrethroids included in the cumulative assessment. The proposed food uses of fenpropathrin will not contribute significantly or change the overall findings in the pyrethroid cumulative risk assessment, as the dietary risks are a minor component of total pyrethroid cumulative risk. For information regarding EPA's efforts to evaluate the risk of exposure to pyrethroids, refer to *http://www.epa.gov/oppsrrd1/reevaluation/pyrethroids-pyrethrins.html.*

D. Safety Factor for Infants and Children

1. *In general.* Section 408(b)(2)(C) of FFDCA provides that EPA shall apply an additional tenfold (10X) margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the database on toxicity and exposure unless EPA determines based on reliable data that a different margin of safety will be safe for infants and children. This additional margin of safety is commonly referred to as the Food Quality Protection Act, Safety Factor (FQPA SF). In applying this provision, EPA either retains the default value of 10X, or uses a different additional safety factor when reliable data available to EPA support the choice of a different factor.

2. *Prenatal and postnatal sensitivity.* The fenpropathrin toxicity database includes developmental toxicity studies in rats and rabbits and a 3-generation reproduction study in rats, and a developmental neurotoxicity (DNT) study in rats. There was no evidence of increased qualitative or quantitative susceptibility noted in any of these studies. This lack of susceptibility is consistent with the results of the guideline prenatal and postnatal testing for other pyrethroid pesticides.

There are several *in vitro* and *in vivo* studies that indicate pharmacodynamic contributions to pyrethroid toxicity are not age-dependent. A study of the toxicity database for pyrethroid chemicals also noted no residual uncertainties regarding age-related sensitivities for the young, based on the absence of prenatal sensitivity observed in 76 guideline studies for 24 pyrethroids and the scientific literature. However, high-dose studies at LD_{50} doses noted that younger animals were more susceptible to the toxicity of pyrethroids. These age-related differences in toxicity are principally due to age-dependent pharmacokinetics; the activity of enzymes associated with the metabolism of pyrethroids increases with age. Nonetheless, the typical environmental exposures to pyrethroids are not expected to overwhelm the clearance capacity in juveniles. In support, at a dose of 4.0 milligrams/kilogram (mg/kg) for deltamethrin (near the Wolansky study LOAEL value of 3.0 mg/kg for deltamethrin), the change in the acoustic startle response was similar between adult and young rats.

3. *Conclusion.* EPA is reducing the FQPA SF to 3X for infants and children less than 6 years of age. For the general population, including children greater than 6 years of age, EPA is reducing the FQPA SF to 1X. The decisions regarding the FQPA SF being used are based on the following considerations:

i. The toxicity database for fenpropathrin is not complete. While the database is considered to be complete with respect to the guideline toxicity studies for fenpropathrin, EPA lacks additional data to address the potential for juvenile sensitivity to all pyrethroids. In light of the literature studies indicating a possibility of increased sensitivity to fenpropathrin in juvenile rats at high doses, EPA has requested proposals for study protocols which could identify and quantify fenpropathrin's potential juvenile sensitivity. The reasons discussed in Unit III.D.3.ii, and the uncertainty regarding the protectiveness of the intraspecies uncertainty factor raised by the literature studies warrant application of an additional 3X for risk assessments for infants and children less than 6 years of age.

ii. There is no evidence that fenpropathrin results in increased susceptibility in *in utero* rats or rabbits in the prenatal developmental studies or in young rats in a 3-generation rat reproduction study. This is consistent with the results of the guideline pre-natal and postnatal testing for other pyrethroid pesticides. There are, however, high dose LD_{50} studies (studies assessing what dose results in lethality to 50 percent of the tested population) in the scientific literature indicating that pyrethroids can result in increased quantitative sensitivity in the young. Examination of pharmacokinetic and pharmacodynamic data indicates that the sensitivity observed at high doses is related to pyrethroid age-dependent pharmacokinetics, the activity of enzymes associated with the metabolism of pyrethroids. Predictive pharmacokinetic models indicate that the differential adult-juvenile pharmacokinetics will result in otherwise equivalent administered doses for adults and juveniles producing a 3X greater dose at the target organ in juveniles compared to adults.

No evidence of increased quantitative or qualitative susceptibility was seen in the pyrethroid scientific literature related to pharmacodynamics (the effect of pyrethroids at the target tissue) both with regard to interspecies differences between rats and humans and to differences between juveniles and adults. Specifically, there are *in vitro* pharmacodynamic data and *in vivo* data indicating similar responses between adult and juvenile rats at low doses and data indicating that the rat is a conservative model compared to the human based on species-specific pharmacodynamics of homologous sodium channel isoforms in rats and humans.

In light of the high dose literature studies showing juvenile sensitivity to pyrethroids and the absence of the requested data on juvenile sensitivity to pyrethroids, EPA is retaining a 3X additional safety factor as estimated by pharmacokinetic modeling. For several reasons, EPA concludes there are reliable data showing that a 3X factor is protective of the safety of infants and children. First, the high doses that produced juvenile sensitivity in the literature studies are well above normal dietary exposure levels of pyrethroids to juveniles and these lower levels of exposure are not expected to overwhelm the ability to metabolize pyrethroids as occurred with the high doses used in the literature studies. This is confirmed by the lack of a finding of increased sensitivity in prenatal and postnatal guideline studies in any pyrethroid, including fenpropathrin, despite the relatively high doses used in those studies. Second, the portions of both the inter- and intraspecies uncertainty factors that account for potential pharmacodynamic differences (generally considered to be approximately 3X for each factor) are likely to overstate the risk of inter- and intraspecies pharmacodynamic differences given the data showing similarities in pharmacodynamics between juveniles and adults and between humans and rats. Finally, as indicated, pharmacokinetic modeling only predicts a 3X difference between juveniles and adults.

iii. There are no residual uncertainties identified in the exposure databases. Although the acute dietary exposure estimates are refined, as described in Unit III.C.1.i., the exposure estimates will not underestimate risk for the established and proposed uses of fenpropathrin. The residue levels used are based on distributions of residues from field trial data, monitoring data reflecting actual residues found in the food supply, and tolerance-level residues for several commodities; the use of estimated PCT information; and, when appropriate, processing factors measured in processing studies or default high-end factors representing the maximum concentration of residue into a processed commodity. EPA made conservative (protective) assumptions in the ground and surface water modeling used to assess exposure to fenpropathrin in drinking water. These assessments will not underestimate the exposure and risks posed by fenpropathrin.

Further information about the reevaluation of the FQPA SF for

pyrethroids may be found in document ID: EPA–HQ–OPP–2011–0746–0011, at regulations.gov.

E. Aggregate Risks and Determination of Safety

EPA determines whether acute and chronic dietary pesticide exposures are safe by comparing aggregate exposure estimates to the acute PAD (aPAD) and chronic PAD (cPAD). For linear cancer risks, EPA calculates the lifetime probability of acquiring cancer given the estimated aggregate exposure. Short-term, intermediate-term, and chronic-term risks are evaluated by comparing the estimated aggregate food, water, and residential exposure to the appropriate PODs to ensure that an adequate MOE exists.

1. *Acute risk.* Using the exposure assumptions discussed in this unit for acute exposure, the acute dietary exposure from food and water to fenpropathrin will occupy 97% of the aPAD for children 3 to 5 years old, the population group receiving the greatest exposure from the dietary assessment for infants and children less than 6 years old; and 27% of the aPAD for children 6 to 12 years old, the population group receiving the greatest exposure from the dietary assessment for the general population other than children less than 6 years old.

2. *Chronic risk.* Based on the data summarized in Unit III.A., there is no increase in hazard with increasing dosing duration. Furthermore, chronic dietary exposures will be lower than acute exposures. Therefore, the acute aggregate assessment is protective of potential chronic aggregate exposures.

3. *Short-term risk.* Short-term aggregate exposure takes into account short-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level). A short-term adverse effect was identified; however, fenpropathrin is not registered for any use patterns that would result in short-term residential exposure. Short-term risk is assessed based on short-term residential exposure plus chronic dietary exposure. Because there is no short-term residential exposure and acute dietary exposure has already been assessed under the appropriately protective aPAD (which is at least as protective as the POD used to assess short-term risk), no further assessment of short-term risk is necessary, and EPA relies on the acute dietary risk assessment for evaluating short-term risk for fenpropathrin.

4. *Intermediate-term risk.* Intermediate-term aggregate exposure takes into account intermediate-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level). Because no intermediate-term adverse effect was identified, fenpropathrin is not expected to pose an intermediate-term risk.

5. *Aggregate cancer risk for U.S. population.* Based on the lack of evidence of carcinogenicity in two adequate rodent carcinogenicity studies, fenpropathrin is not expected to pose a cancer risk to humans.

6. *Determination of safety.* Based on these risk assessments, EPA concludes that there is a reasonable certainty that no harm will result to the general population, or to infants and children from aggregate exposure to fenpropathrin residues.

IV. Other Considerations

A. Analytical Enforcement Methodology

An adequate enforcement methodology utilizing gas chromatography with electron capture detection (GC/ECD, Residue Method Number RM–22–4) is available to enforce the tolerance expression.

The method may be requested from: Chief, Analytical Chemistry Branch, Environmental Science Center, 701 Mapes Rd., Ft. Meade, MD 20755–5350; telephone number: (410) 305–2905; email address: *residuemethods@epa.gov.*

B. International Residue Limits

In making its tolerance decisions, EPA seeks to harmonize U.S. tolerances with international standards whenever possible, consistent with U.S. food safety standards and agricultural practices. EPA considers the international maximum residue limits (MRLs) established by the Codex Alimentarius Commission (Codex), as required by FFDCA section 408(b)(4). The Codex Alimentarius is a joint United Nations Food and Agriculture Organization/World Health Organization food standards program, and it is recognized as an international food safety standards-setting organization in trade agreements to which the United States is a party. EPA may establish a tolerance that is different from a Codex MRL; however, FFDCA section 408(b)(4) requires that EPA explain the reasons for departing from the Codex level.

The Codex has established MRLs for fenpropathrin in or on tea, green and black at 2.0 ppm. Using the Organization for Economic Cooperation and Development (OECD) MRL calculation procedures, the recommended U.S. tolerance for tea, dried would be 3.0 ppm. However, for the purposes of harmonization of the U.S. tolerance with the established Codex MRL, EPA is recommending the tolerance of 2.0 ppm for tea, dried. The Agency considers this tolerance level to be adequate because the highest field trial value noted for tea, dried was 1.38 ppm.

C. Revisions to Petitioned-for Tolerances

Based on the data supporting the petitions, EPA revised the proposed tolerances on acerola, feijoa, guava, jaboticaba, passionfruit, startfruit and wax jambu from 1.5 ppm to 3.0 ppm; longan, lychee, pulasan, rambutan, and Spanish lime from 3.0 ppm to 7.0 ppm; and atemoya, birba, cherimoya, custard apple, ilama, soursop, and sugar apple, from 1.0 ppm to 1.5 ppm. The Agency revised these tolerance levels based on analysis of the residue field trial data using the OECD tolerance calculation procedures. EPA also revised the proposed commodity definition for tea to tea, dried in order to reflect the Agency's commodity nomenclature.

Finally, the Agency has revised the tolerance expression to clarify (1) that, as provided in FFDCA section 408(a)(3), the tolerance covers metabolites and degradates of fenpropathrin not specifically mentioned; and (2) that compliance with the specified tolerance levels is to be determined by measuring only the specific compounds mentioned in the tolerance expression.

V. Conclusion

Therefore, tolerances are established for residues of fenpropathrin, alpha-cyano-3-phenoxy-benzyl 2,2,3,3-tetramethylcyclopropanecarboxylate, in or on acerola, feijoa, guava, jaboticaba, passionfruit, starfruit and wax jambu at 3.0 ppm; longan, lychee, pulasan, rambutan and Spanish lime, at 7.0 ppm; atemoya, biriba, cherimoya, custard apple, ilama, soursop and sugar apple, at 1.5 ppm; and tea, dried at 2.0 ppm.

VI. Statutory and Executive Order Reviews

This final rule establishes tolerances under FFDCA section 408(d) in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled ''Regulatory Planning and Review'' (58 FR 51735, October 4, 1993). Because this final rule has been exempted from review under Executive Order 12866, this final rule is not subject to Executive Order 13211, entitled ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66

FR 28355, May 22, 2001) or Executive Order 13045, entitled ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), nor does it require any special considerations under Executive Order 12898, entitled ''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations'' (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established on the basis of a petition under FFDCA section 408(d), such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), do not apply.

This final rule directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of FFDCA section 408(n)(4). As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined that Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000) do not apply to this final rule. In addition, this final rule does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1501 *et seq.*).

This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA) (15 U.S.C. 272 note).

VII. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: November 15, 2012.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. In § 180.466, paragraph (a), revise the introductory text, alphabetically add the following commodities and footnote 1 to the table to read as follows:

§ 180.466 Fenpropathrin; tolerances for residues.

(a) *General.* Tolerances are established for residues of fenpropathrin, including its metabolites and degradates, in or on the commodities in the following table. Compliance with the tolerance levels specified below is to be determined by measuring only fenpropathrin (alpha-cyano-3-phenoxy-benzyl 2,2,3,3 tetramethylcyclopropanecarboxylate).

Commodity	Parts per million
Acerola	3.0
* * * * *	
Atemoya	1.5
* * * * *	
Biriba	1.5
* * * * *	
Cherimoya	1.5
* * * * *	
Custard apple	1.5
* * * * *	
Feijoa	3.0
* * * * *	
Guava	3.0
* * * * *	
Ilama	1.5
Jaboticaba	3.0
* * * * *	
Longan	7.0
Lychee	7.0
* * * * *	
Passionfruit	3.0
* * * * *	
Pulasan	7.0
Rambutan	7.0
* * * * *	
Soursop	1.5
Spanish lime	7.0
* * * * *	
Starfruit	3.0
* * * * *	
Sugar apple	1.5
Tea, dried[1]	2.0
* * * * *	
Wax jambu	3.0

[1] There are no U.S. registrations as of November 28, 2012, for the use of fenpropathrin on tea, dried.

* * * * *

[FR Doc. 2012–28721 Filed 11–27–12; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2012–0060; FRL–9365–1]

Dinotefuran; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes tolerances for residues of dinotefuran in or on rice grain, egg, and poultry meat byproducts. Mitsui Chemicals Agro Inc., c/o Landis International, Inc., requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective November 28, 2012. Objections and requests for hearings must be received on or before January 28, 2013, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2012–0060, is available at *http://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), EPA West Bldg., Rm. 3334, 1301 Constitution Ave. NW., Washington, DC 20460–0001. The Public Reading Room is open from 8:30

a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Rita Kumar, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: (703) 308–8291; email address: *kumar.rita@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

B. How can I get electronic access to other related information?

You may access a frequently updated electronic version of EPA's tolerance regulations at 40 CFR part 180 through the Government Printing Office's e-CFR site at *http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?&c=ecfr&tpl=/ecfrbrowse/Title40/40tab_02.tpl.*

C. How can I file an objection or hearing request?

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2012–0060 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing, and must be received by the Hearing Clerk on or before January 28, 2013. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing (excluding any Confidential Business Information (CBI)) for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit the non-CBI copy of your objection or hearing request, identified by docket ID number EPA–HQ–OPP–2012–0060, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.
- *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001.
- *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *http://www.epa.gov/dockets/contacts.htm.* Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at *http://www.epa.gov/dockets.*

II. Summary of Petitioned-For Tolerance

In the **Federal Register** of May 23, 2012, (77 FR 30481) (FRL–9347–8), EPA issued a document pursuant to FFDCA section 408(d)(3), 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 1F7953) by Mitsui Chemicals Agro, Inc., c/o Landis International Ltd., P. O. Box 5126, Valdosta, GA 31603. The petition requested that 40 CFR 180.603 be amended by establishing tolerances for residues of the insecticide dinotefuran (*RS*)-1-methyl-2-nitro-3-((tetrahydro-3-furyl)methyl)guanidine and its major metabolites DN, 1-methyl-3-(tetrahydro-3-furylmethyl)guanidine and UF, 1-methyl-3-(tetrahydro-3-furylmethyl)-urea, in or on rice, grain at 10 parts per million (ppm). That document referenced a summary of the petition prepared by Mitsui Chemicals Agro, Inc., the registrant, which is available in the docket, *http://www.regulations.gov.* There were no comments received in response to the notice of filing.

Based upon review of the data supporting the petition, EPA has modified the level for which the tolerance is being established for rice, grain. EPA has also established tolerances for residues of dinotefuran in eggs and poultry, meat byproducts. The reason for these changes is explained in Unit IV.C.

III. Aggregate Risk Assessment and Determination of Safety

Section 408(b)(2)(A)(i) of FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is ''safe.'' Section 408(b)(2)(A)(ii) of FFDCA defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue. * * *''

Consistent with FFDCA section 408(b)(2)(D), and the factors specified in FFDCA section 408(b)(2)(D), EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for denotefuran including exposure resulting from the tolerances established by this action. EPA's assessment of exposures and risks associated with denotefuran follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children.

Dinotefuran has low acute toxicity by oral, dermal, and inhalation exposure routes. It is not a dermal sensitizer, but causes a low level of skin irritation. The main target of toxicity is the nervous system but effects on the nervous system were only observed at high doses. Nervous system toxicity was manifested as clinical signs and

decreased motor activity seen after acute dosing (in both rats and rabbits) and changes in motor activity which are consistent with effects on the nicotinic cholinergic nervous system seen after repeated dosing. Typically, low to moderate levels of neonicotinoids, such as dinotefuran, activate the nicotinic acetylcholine receptors causing stimulation of the peripheral nervous system (PNS). High levels of neonicotinoids can over stimulate the PNS, maintaining cation channels in the open state which blocks the action potential and leads to paralysis.

Dinotefuran was well tolerated at high doses following dietary administration for 90 days to mice, rats, and dogs. The most sensitive effects were decreases in body weight and/or body weight gain but even these effects occurred at or near the limit dose. Changes in spleen and thymus weights were seen in mice, rats and dogs following subchronic and chronic dietary exposures. However, these weight changes were not corroborated with alterations in hematology parameters, histopathological lesions in these organs, or toxicity to the hematopoietic system. Furthermore, the toxicology data base contains immunotoxicity studies in mice and rats and a developmental immunotoxicity study in rats. In the immunotoxicity studies there were no effect on T-cell dependent antibody response when tested up to the limit dose in male and female mice and in male and female rats. There were no changes in spleen and thymus weight and there were no histopathological lesions in these organs in those studies. In the developmental immunotoxicity study, there was no evidence of an effect on the functionality of the immune system in rats that were exposed to dinotefuran at the limit dose during the prenatal, postnatal, and post-weaning periods. Consequently, the thymus weight changes seen in dogs and the spleen weight changes seen in mice and rats were not considered to be toxicologically relevant.

No systemic or neurotoxicity was seen following repeated dermal applications at the limit dose to rats for 28 days. No systemic or portal of entry effects were seen following repeated inhalation exposure at the maximum obtainable concentrations to rats for 28 days.

In the prenatal studies, no maternal or developmental toxicity was seen at the limit dose in rats. In rabbits, maternal toxicity manifested as clinical signs of neurotoxicity but no developmental toxicity was seen. In the reproduction study, parental, offspring, and reproductive toxicity was seen at the limit dose. Parental toxicity included decreased body weight gain, transient decrease in food consumption, and decreased thyroid weights. Offspring toxicity was characterized as decreased forelimb grip strength or hindlimb grip strength in the F_1 pups. There was no adverse effect on reproductive performance at any dose. In the developmental neurotoxicity study, no maternal or offspring toxicity was seen at any dose including the limit dose.

There was no evidence of carcinogenicity in male and female mice and in male and female rats fed diets containing dinotefuran at the limit dose for 78 weeks to mice and 104 weeks to rats. Dinotefuran was non-mutagenic in both *in vivo* and *in vitro* assays. Specific information on the studies received and the nature of the adverse effects caused by dinotefuran as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies can be found at *http://www.regulations.gov* in document ''Dinotefuran: Human Health Risk Assessment for Proposed Section 3 Uses on Rice and Food/Feed Handling Establishments, and New Horse Spot-On and Total Release Fogger Products,'' at pages 40–45 in docket ID number EPA–HQ–OPP–2012–0060.

B. Toxicological Points of Departure/Levels of Concern

Once a pesticide's toxicological profile is determined, EPA identifies toxicological points of departure (POD) and levels of concern to use in evaluating the risk posed by human exposure to the pesticide. For hazards that have a threshold below which there is no appreciable risk, the toxicological POD is used as the basis for derivation of reference values for risk assessment. PODs are developed based on a careful analysis of the doses in each toxicological study to determine the dose at which no adverse effects are observed (the NOAEL) and the lowest dose at which adverse effects of concern are identified (the LOAEL). Uncertainty/safety factors are used in conjunction with the POD to calculate a safe exposure level—generally referred to as a population-adjusted dose (PAD) or a reference dose (RfD)—and a safe margin of exposure (MOE). For non-threshold risks, the Agency assumes that any amount of exposure will lead to some degree of risk. Thus, the Agency estimates risk in terms of the probability of an occurrence of the adverse effect expected in a lifetime. For more information on the general principles EPA uses in risk characterization and a complete description of the risk assessment process, see *http://www.epa.gov/pesticides/factsheets/riskassess.htm.*

A summary of the toxicological endpoints for dinotefuran used for human risk assessment is shown in Table 1 of this unit. The dinotefuran hazard profile was updated in the most recent risk assessment completed on July 20, 2012, and nothing has changed since that update. For a more detailed discussion of the endpoint selection, refer to Appendix A.3 on pages 44–47 in the document titled ''Dinotefuran: Human Health Risk Assessment for Proposed Section 3 Uses on Tuberous and Corm Vegetables Subgroup 1C, Onion Subgroup 3–07A, Onion Subgroup 3–07B, Small Fruit Subgroup 13–07F, Berry Subgroup 13–07H, Peach, and Watercress, And a Tolerance on Imported Tea'' in docket ID number EPA–HQ–OPP–2011–0433.

TABLE 1—SUMMARY OF TOXICOLOGICAL DOSES AND ENDPOINTS FOR DINOTEFURAN FOR USE IN HUMAN HEALTH RISK ASSESSMENT

Exposure/scenario	Point of departure and uncertainty/safety factors	RfD, PAD, LOC for risk assessment	Study and toxicological effects
Acute dietary (General population including infants and children).	NOAEL = 125 mg/kg/day UF_A = 10X UF_H = 10X FQPA SF = 1X	aRfD = 1.25 mg/kg/day aPAD = 1.25 mg/kg/day	Developmental Toxicity Study in Rabbits LOAEL = 300 mg/kg/day based on clinical signs in does (prone position, panting, tremor and erythema) seen following the first dose on Gestation Day 6.
Chronic dietary (All populations).	NOAEL= 99.7 mg/kg/day UF_A = 10X UF_H = 10X FQPA SF = 1X	cRfD = 1.0 mg/kg/day cPAD = 1.0 mg/kg/day	Chronic Toxicity/Carcinogenicity Study in Rats LOAEL = 991 mg/kg/day based on decreased body weight gain and nephrotoxicity.

TABLE 1—SUMMARY OF TOXICOLOGICAL DOSES AND ENDPOINTS FOR DINOTEFURAN FOR USE IN HUMAN HEALTH RISK ASSESSMENT—Continued

Exposure/scenario	Point of departure and uncertainty/safety factors	RfD, PAD, LOC for risk assessment	Study and toxicological effects
Incidental Oral Short-Term (1–30 days).	NOAEL= 99.7 mg/kg/day .. UF_A = 10X ..... UF_H = 10X ..... FQPA SF = 1X	LOC for MOE = 100	Chronic Toxicity/Carcinogenicity Study in Rats LOAEL = 991 mg/kg/day based on decreased body weight gain and nephrotoxicity.

FQPA SF = Food Quality Protection Act Safety Factor. LOAEL = lowest-observed-adverse-effect-level. LOC = level of concern. mg/kg/day = milligram/kilogram/day. MOE = margin of exposure. NOAEL = no-observed-adverse-effect-level. PAD = population adjusted dose (a = acute, c = chronic). RfD = reference dose. UF_A = extrapolation from animal to human (interspecies). UF_H = potential variation in sensitivity among members of the human population (intraspecies).

C. Exposure Assessment

1. *Dietary exposure from food and feed uses.* In evaluating dietary exposure to dinotefuran, EPA considered exposure under the petitioned-for tolerances as well as all existing dinotefuran tolerances in 40 CFR 180.603. EPA assessed dietary exposures from dinotefuran in food as follows:

i. *Acute exposure.* Quantitative acute dietary exposure and risk assessments are performed for a food-use pesticide, if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a 1-day or single exposure.

Such effects were identified for dinotefuran. In estimating acute dietary exposure, EPA used food consumption information from the U.S. Department of Agriculture (USDA) National Health and Nutrition Examination Survey, What We Eat in America, (NHANES/WWEIA). This dietary survey was conducted from 2003 to 2008. As to residue levels in food, EPA assumed 100 percent crop treated (PCT) and tolerance-level residues for all current and proposed crops.

ii. *Chronic exposure.* In conducting the chronic dietary exposure assessment EPA used the food consumption data from the USDA 1994–1996 and 1998 Continuing Survey of Food Intake (CSFII). As to residue levels in food, EPA assumed 100 percent crop treated (PCT) and tolerance-level residues for all current and proposed crops.

iii. *Cancer.* Based on the data summarized in Unit III.A., EPA has concluded that dinotefuran does not pose a cancer risk to humans. Therefore, a dietary exposure assessment for the purpose of assessing cancer risk is unnecessary.

iv. *Anticipated residue and percent crop treated (PCT) information.* EPA did not use anticipated residue and/or PCT information in the dietary assessment for dinotefuran. Tolerance level residues and/or 100% CT were assumed for all food commodities.

2. *Dietary exposure from drinking water.* The Agency used screening level water exposure models in the dietary exposure analysis and risk assessment for dinotefuran in drinking water. These simulation models take into account data on the physical, chemical, and fate/transport characteristics of dinotefuran. Further information regarding EPA drinking water models used in pesticide exposure assessment can be found at *http://www.epa.gov/oppefed1/models/water/index.htm.*

Based on the Tier 1 Rice Model and Screening Concentration in Ground Water (SCI–GROW) models, the estimated drinking water concentrations (EDWCs) of dinotefuran for acute exposures are estimated to be 269 parts per billion (ppb) for surface water and 4.9 ppb for ground water and for chronic exposures for non-cancer assessments are estimated to be 253–257 ppb, depending upon retention time from 10 to 30 days, for surface water and 4.9 ppb for ground water.

Modeled estimates of drinking water concentrations were directly entered into the dietary exposure model. For acute dietary risk assessment, the water concentration value of 269 ppb was used to assess the contribution to drinking water and for chronic dietary risk assessment, the water concentration of value 257 ppb was used to assess the contribution to drinking water.

3. *From non-dietary exposure.* The term ''residential exposure'' is used in this document to refer to non-occupational, non-dietary exposure (e.g., for lawn and garden pest control, indoor pest control, termiticides, and flea and tick control on pets).

Dinotefuran is currently registered for the following uses that could result in residential exposures: Turf, ornamentals, vegetable gardens, pet spot-ons, indoor aerosol sprays, crack and crevice sprays. EPA assessed residential exposure using the following assumptions: Each of these existing residential use patterns were reassessed in the latest human health risk assessment using the updated 2012 Residential Standard Operating Procedures and body weights. Refer to the document titled ''Dinotefuran: Human Health Risk Assessment for Proposed Section 3 Uses on Tuberous and Corm Vegetables Subgroup 1C, Onion Subgroup 3–07A, Onion Subgroup 3–07B, Small Fruit Subgroup 13–07F, Berry Subgroup 13–07H, Peach, and Watercress, And a Tolerance on Imported Tea'' in docket ID number EPA–HQ–OPP–2011–0433.

There are no non-dietary exposure scenarios associated with use on rice. Further information regarding EPA standard assumptions and generic inputs for residential exposures may be found at *http://www.epa.gov/pesticides/trac/science/trac6a05.pdf.*

4. *Cumulative effects from substances with a common mechanism of toxicity.* Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider ''available information'' concerning the cumulative effects of a particular pesticide's residues and ''other substances that have a common mechanism of toxicity.''

EPA has not found dinotefuran to share a common mechanism of toxicity with any other substances, and dinotefuran does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has assumed that dinotefuran does not have a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see EPA's Web site at *http://www.epa.gov/pesticides/cumulative.*

D. Safety Factor for Infants and Children

1. *In general.* Section 408(b)(2)(C) of FFDCA provides that EPA shall apply an additional tenfold (10X) margin of safety for infants and children in the

case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the database on toxicity and exposure unless EPA determines based on reliable data that a different margin of safety will be safe for infants and children. This additional margin of safety is commonly referred to as the FQPA Safety Factor (SF). In applying this provision, EPA either retains the default value of 10X, or uses a different additional safety factor when reliable data available to EPA support the choice of a different factor.

2. *Prenatal and postnatal sensitivity.* In the pre-natal studies, no maternal or developmental toxicity was seen at the limit dose in rats. In rabbits, maternal toxicity manifested as clinical signs of neurotoxicity but no developmental toxicity was seen. In the rat reproduction study, parental, offspring, and reproductive toxicity was seen at the limit dose. Parental toxicity included decreased body weight gain, transient decrease in food consumption, and decreased thyroid weights. Offspring toxicity was characterized as decreased forelimb grip strength or hindlimb grip strength in the F_1 pups. There was no adverse effect on reproductive performance at any dose. In the developmental neurotoxicity study, no maternal or offspring toxicity was seen at any dose including the limit dose.

3. *Conclusion.* EPA has determined that reliable data show the safety of infants and children would be adequately protected if the FQPA SF were reduced to 1X. That decision is based on the following findings:

i. The toxicity database for dinotefuran is complete.

ii. The neurotoxic potential of dinotefuran has been adequately considered. Dinotefuran is a neonicotinoid and has a neurotoxic mode of pesticidal action. Consistent with the mode of action, changes in motor activity were seen in repeat-dose studies, including the subchronic neurotoxicity study. Additionally, decreased grip strength and brain weight was observed in the offspring of a multi-generation reproduction study albeit at doses close to the limit dose. For these reasons, a developmental neurotoxicity (DNT) study was required. The DNT study did not show evidence of a unique sensitivity of the developing nervous system; no effects on neurobehavioral parameters were seen in the offspring at any dose, including the limit dose.

iii. There is no evidence that dinotefuran results in increased susceptibility in *in utero* rats or rabbits in the prenatal developmental studies or in young rats in the 2-generation reproduction study.

iv. There are no residual uncertainties identified in the exposure databases. The dietary food exposure assessments were performed based on 100 percent crop treated (PCT) and tolerance-level residues. EPA made conservative (protective) assumptions in the ground and surface water modeling used to assess exposure to dinotefuran in drinking water. EPA used similarly conservative assumptions to assess postapplication exposure of children for incidental oral exposures. These assessments will not underestimate the exposure and risks posed by dinotefuran.

E. Aggregate Risks and Determination of Safety

EPA determines whether acute and chronic dietary pesticide exposures are safe by comparing aggregate exposure estimates to the acute PAD (aPAD) and chronic PAD (cPAD). For linear cancer risks, EPA calculates the lifetime probability of acquiring cancer given the estimated aggregate exposure. Short-, intermediate-, and chronic-term risks are evaluated by comparing the estimated aggregate food, water, and residential exposure to the appropriate PODs to ensure that an adequate MOE exists.

1. *Acute risk.* Using the exposure assumptions discussed in this unit for acute exposure, the acute dietary exposure from food and water to dinotefuran will occupy 7.6 percent of the aPAD for all infants < 1 year old, the population group receiving the greatest exposure.

2. *Chronic risk.* Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that chronic exposure to dinotefuran from food and water will utilize 3.9 percent of the cPAD for children 1 to 2 years old, the population group receiving the greatest exposure. Based on the explanation in Unit III.C.3., regarding residential use patterns, chronic residential exposure to residues of dinotefuran is not expected.

3. *Short-term risk.* Short-term aggregate exposure takes into account short-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level).

Dinotefuran is currently registered for uses that could result in short-term residential exposure, and the Agency has determined that it is appropriate to aggregate chronic exposure through food and water with short-term residential exposures to dinotefuran.

Using the exposure assumptions described in this unit for short-term exposures, EPA has concluded the combined short-term food, water, and residential exposures result in aggregate MOEs of 790 for children for co-occurring post-application exposure resulting in the greatest exposure (i.e., from the potentially co-occurring use of the total release fogger product and the existing cat and dog spot-on uses. Because EPA's level of concern for dinotefuran is a MOE of 100 or below, these MOEs are not of concern.

4. *Intermediate-term risk.* Intermediate-term aggregate exposure takes into account intermediate-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level). Intermediate-term exposure is not expected for the adult residential exposure pathway. Therefore, the intermediate-term aggregate risk would be equivalent to the chronic dietary exposure estimate. For children, intermediate-term incidental oral exposures could potentially occur from indoor uses. However, while it is possible for children to be exposed for longer durations, the magnitude of residues is expected to be lower due to dissipation or other activities. Since incidental oral short- and intermediate-term toxicity endpoints and points of departure are the same, the short-term aggregate risk estimate, which includes the highest residential exposure estimate (from turf), is protective of any intermediate-term exposures.

5. *Aggregate cancer risk for U.S. population.* Based on the lack of evidence of carcinogenicity in two adequate rodent carcinogenicity studies, dinotefuran is not expected to pose a cancer risk to humans.

6. *Determination of safety.* Based on these risk assessments, EPA concludes that there is a reasonable certainty that no harm will result to the general population, or to infants and children from aggregate exposure to dinotefuran residues.

IV. Other Considerations

A. Analytical Enforcement Methodology

Adequate enforcement methodology a high performance liquid chromatography/tandem mass spectrometry (HPLC/MS/MS method for the determination of residues of dinotefuran, and the metabolites DN, and UF; an HPLC/ultraviolet (UV) detection method for the determination of residues of dinotefuran; and HPLC/MS and HPLC/MS/MS methods for the determination of DN and UF) is

available to enforce the tolerance expression.

The methods may be requested from: Chief, Analytical Chemistry Branch, Environmental Science Center, 701 Mapes Rd., Ft. Meade, MD 20755–5350; telephone number: (410) 305–2905; email address: *residuemethods@epa.gov.*

B. International Residue Limits

In making its tolerance decisions, EPA seeks to harmonize U.S. tolerances with international standards whenever possible, consistent with U.S. food safety standards and agricultural practices. EPA considers the international maximum residue limits (MRLs) established by the Codex Alimentarius Commission (Codex), as required by FFDCA section 408(b)(4). The Codex Alimentarius is a joint United Nations Food and Agriculture Organization/World Health Organization food standards program, and it is recognized as an international food safety standards-setting organization in trade agreements to which the United States is a party. EPA may establish a tolerance that is different from a Codex MRL; however, FFDCA section 408(b)(4) requires that EPA explain the reasons for departing from the Codex level.

The Codex has not established a MRL for dinotefuran for any of the commodities in this rule.

C. Revisions to Petitioned-For Tolerances

Use of the Organization of Economic Cooperation and Development tolerance calculation procedures indicates that the tolerances for residues in or on rice grain should be established at 9.0 ppm, instead of 10.0 ppm proposed by the registrant. The appropriate residue definition is rice, grain.

EPA has also concluded that poultry tolerances in egg and poultry meat byproducts at 0.01 ppm are now needed as a result of the increased dietary burden resulting from addition of rice grain and bran to the diet.

V. Conclusion

Therefore, tolerances are established for residues of dinotefuran, (*R,S*)-1-methyl-2-nitro-3-((tetrahydro-3-furanyl) methyl)guanidine, including its metabolites and degradates, in or on rice, grain at 9.0 ppm, and in or on egg and poultry, meat byproducts at 0.01 ppm.

VI. Statutory and Executive Order Reviews

This final rule establishes tolerances under FFDCA section 408(d) in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled ''Regulatory Planning and Review'' (58 FR 51735, October 4, 1993). Because this final rule has been exempted from review under Executive Order 12866, this final rule is not subject to Executive Order 13211, entitled ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), nor does it require any special considerations under Executive Order 12898, entitled ''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations'' (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established on the basis of a petition under FFDCA section 408(d), such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), do not apply.

This final rule directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of FFDCA section 408(n)(4). As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined that Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000) do not apply to this final rule. In addition, this final rule does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1501 *et seq.*).

This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA) (15 U.S.C. 272 note).

VII. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: October 26, 2012.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. Section 180.603 is amended as follows:

■ i. Add an entry for ''rice, grain'' in alphabetical order to the table in paragraph (a)(1).

■ ii. Add entries for ''egg'' and ''poultry, meat byproducts'' in alphabetical order to the table in paragraph (a)(2).

■ iii. Revise paragraph (b) to read as set forth below.

The added and revised text read as follows:

§ 180.603 Dinotefuran, tolerances for residues.

(a) * * * (1) * * *

Commodity	Parts per million
* * * * *	
Rice, grain	9.0
* * * * *	

(2) * * *

Commodity	Parts per million
* * * * *	
Egg	0.01
* * * * *	
Poultry, meat byproducts	0.01
* * * * *	

(b) *Section 18 emergency exemptions.* [Reserved]

* * * * *

[FR Doc. 2012–28472 Filed 11–27–12; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 571

[Docket No. NHTSA–2010–0032]

RIN 2127–AK82

Federal Motor Vehicle Safety Standards; Side Impact Protection

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation.

ACTION: Final rule; correcting amendments.

SUMMARY: On August 24, 2011 we published a final rule responding to a petition for reconsideration of a final rule on the Federal motor vehicle safety standard for side impact protection. In today's document, we correct a minor error in that rule. The agency is also correcting several typographical errors in the standard.

DATES: This rule is effective November 28, 2012.

FOR FURTHER INFORMATION CONTACT: For non-legal issues, you may call Louis N. Molino, NHTSA Office of Crashworthiness Standards, telephone 202–366–1740. For legal issues, you may call Deirdre Fujita, NHTSA Office of Chief Counsel, telephone 202–366–2992. You may send mail to these officials at the National Highway Traffic Safety Administration, 1200 New Jersey Avenue SE., West Building, Washington, DC 20590.

SUPPLEMENTARY INFORMATION: This document makes two corrections to Federal Motor Vehicle Safety Standard (FMVSS) No. 214, ''Side impact protection,'' 49 CFR 571.214.

On September 11, 2007, NHTSA published a final rule adopting a pole test into FMVSS No. 214. Later, NHTSA published responses to petitions for reconsideration of parts of that rule, including a final rule published August 24, 2011 (76 FR 52880).[1] The August 24, 2011, document had a minor error, which we are correcting today. We are also making corrections to typographical errors in FMVSS No. 214 which occurred previously in the FMVSS No. 214 rulemaking.

Correcting Amendments

This notice makes minor corrections to FMVSS No. 214 in two areas. First, it removes S12.3.4(i) from the regulatory text of FMVSS No. 214. S12.3.4(i) contains obsolete instructions for leveling the head of a test dummy. In the preamble of the August 2011 final rule, NHTSA explained that it was moving head-leveling instructions contained in S12.3.4(i) to paragraph (h).[2] As a result of that move, S12.3.4(i) was no longer needed, but NHTSA inadvertently did not remove S12.3.4(i) from the regulatory text. To correct that error, we are removing and reserving S12.3.4(i), and making a conforming change to S12.3.4(j).

Second, the agency has identified minor typographical errors in several sections of FMVSS No. 214 that occurred in the past. These errors are related to the positioning of the 5th percentile adult female dummy. In three of the five sections, S12.3.2(c), S12.3.3(c) and S12.3.4(l), the ''±'' symbols for the discrete arm position settings were not set forth correctly, and in some instances extraneous text was inadvertently added when the amendments were printed in the Code of Federal Regulations. In S12.3.3(a)(4), the ± symbol was incorrectly represented by just a plus sign for the longitudinal centerline tolerance, and in S12.3.4(c), the metric unit of millimeters (mm) was used in both the metric tolerance of the seating reference point (SgRP) and its English conversion. This document corrects these errors.

This document also amends the authority citation for 49 CFR Part 571, by changing the citation to the DOT regulation setting forth delegations made by the Secretary to Departmental officials.[3]

List of Subjects in 49 CFR Part 571

Imports, Motor vehicle safety, Motor vehicles, Rubber and rubber products, and Tires.

Accordingly, 49 CFR part 571 is corrected by making the following correcting amendments:

PART 571—FEDERAL MOTOR VEHICLE SAFETY STANDARDS

■ 1. The authority citation for part 571 of title 49 is revised to read as follows:

Authority: 49 U.S.C. 322, 30111, 30115, 30117, and 30166; delegation of authority at 49 CFR 1.95.

■ 2. Section 571.214 is amended by:
■ a. Revising S12.3.2(c), S12.3.3(a)(4), S12.3.3(c), S12.3.4(c);
■ b. Removing and reserving S12.3.4(i) and
■ c. Revising S12.3.4(j) and S12.3.4(l).

The revisions read as follows:

§ 571.214 Standard No. 214; Side impact protection.

* * * * *

S12.3.2 * * *

(c) *Driver arm/hand positioning.* Place the dummy's upper arm such that the angle between the projection of the arm centerline on the midsagittal plane of the dummy and the torso reference line is 45° ± 5°. The torso reference line is defined as the thoracic spine centerline. The shoulder-arm joint allows for discrete arm positions at 0, ± 45, ± 90, ± 135, and 180 degree settings where positive is forward of the spine.

* * * * *

S12.3.3 * * *

(a) * * *

(4) Bench seats. Position the midsagittal plane of the dummy vertical and parallel to the vehicle's longitudinal centerline and the same distance from the vehicle's longitudinal centerline, within ± 10 mm (± 0.4 in), as the midsagittal plane of the driver dummy.

* * * * *

(c) *Passenger arm/hand positioning.* Place the dummy's upper arm such that the angle between the projection of the arm centerline on the midsagittal plane of the dummy and the torso reference line is 45° ± 5°. The torso reference line is defined as the thoracic spine centerline. The shoulder-arm joint allows for discrete arm positions at 0, ±

[1] See also 73 FR 32473 (June 9, 2008), and 75 FR 12123 (March 15, 2010).

[2] Note that a sentence in the preamble of the August 2011 final rule (76 FR at 52882, col. 2) stated: ''Yet, as noted above for S12.3.2(a)(10), the instruction that was in *S12.3.3(a)(9) and S12.3.4(h)* (to 'minimize the angle') [emphasis added] has not been deleted but is now integrated into the procedures of S12.3.3(a)(9) and S12.3.4(h).'' This sentence referred to incorrect section numbers and should have stated ''Yet, as noted above for S12.3.2(a)(10), the instruction that was in *S12.3.3(a)(10) and S12.3.4(i)* [emphasis added] (to 'minimize the angle') has not been deleted but is now integrated * * *.''

[3] See 77 FR 49964, August 17, 2012. Final rule updating Office of the Secretary of Transportation regulations delegating authority from the Secretary to Departmental officers.

45, ± 90, ± 135, and 180 degree settings where positive is forward of the spine.

* * * * *

S12.3.4 * * *

(c) Place the dummy on the seat cushion so that its midsagittal plane is vertical and coincides with the vertical longitudinal plane through the center of the seating position SgRP within ±10 mm (±0.4 in).

* * * * *

(j) Measure and set the dummy's pelvic angle using the pelvic angle gauge. The angle is set to 20.0 degrees ± 2.5 degrees. If this is not possible, adjust the pelvic angle as close to 20.0 degrees as possible while keeping the transverse instrumentation platform of the head as level as possible, as specified in S12.3.4(h).

* * * * *

(l) *Passenger arm/hand positioning.* Place the rear dummy's upper arm such that the angle between the projection of the arm centerline on the midsagittal plane of the dummy and the torso reference line is 45° ± 5°. The torso reference line is defined as the thoracic spine centerline. The shoulder-arm joint allows for discrete arm positions at 0, ± 45, ± 90, ± 135, and 180 degree settings where positive is forward of the spine.

* * * * *

Issued on: November 20, 2012.

Christopher J. Bonanti,

Associate Administrator for Rulemaking.

[FR Doc. 2012–28810 Filed 11–27–12; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 224

[Docket No. 0912161432–2630–04]

RIN 0648–XT37

Endangered and Threatened Wildlife and Plants; Endangered Status for the Main Hawaiian Islands Insular False Killer Whale Distinct Population Segment

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: In response to a petition from the Natural Resources Defense Council, we, the NMFS, issue a final determination to list the Main Hawaiian Islands insular false killer whale (*Pseudorca crassidens*) distinct population segment (DPS) as an endangered species under the Endangered Species Act (ESA). We intend to consider critical habitat for this DPS in a separate rulemaking. The effect of this action will be to implement the protective features of the ESA to conserve and recover this species.

DATES: This final rule is effective on December 28, 2012.

ADDRESSES: National Marine Fisheries Service, Pacific Islands Regional Office, Protected Resources Division, 1601 Kapiolani Blvd., Suite 1110, Honolulu HI, 96814.

FOR FURTHER INFORMATION CONTACT: Krista Graham, NMFS, Pacific Islands Regional Office, 808–944–2238; Lisa van Atta, NMFS, Pacific Islands Regional Office, 808–944–2257; or Dwayne Meadows, NMFS, Office of Protected Resources, 301–427–8403. The final rule, references, and other materials relating to this determination can be found on our Web site at *http://www.fpir.noaa.gov/PRD/prd_false_killer_whale.html.*

SUPPLEMENTARY INFORMATION:

Background

On October 1, 2009, we received a petition from the Natural Resources Defense Council requesting that we list the insular population of Hawaiian false killer whales as an endangered species under the ESA and designate critical habitat concurrent with listing. The petition considered the insular population of Hawaiian false killer whales and the Hawaii insular stock of false killer whales recognized in the 2008 Stock Assessment Report (SAR) (Carretta *et al.,* 2009) (available at *http://www.nmfs.noaa.gov/pr/pdfs/sars/*), which we completed as required by the Marine Mammal Protection Act (MMPA) (16 U.S.C. 1361 *et seq.*), to be synonymous. However, in light of new information in the draft 2012 SAR (Carretta *et al.,* 2012b) that identifies a third stock of false killer whales associated with the Northwestern Hawaiian Islands (discussed later), for the purposes of this listing decision we now refer to the Hawaiian insular false killer whale as the Main Hawaiian Islands (MHI) insular population of false killer whales.

On January 5, 2010, we determined that the petitioned action presented substantial scientific and commercial information indicating that the petitioned action may be warranted, and we requested information to assist with a comprehensive status review of the species to determine if the MHI insular false killer whale warranted listing under the ESA (75 FR 316). A biological review team (BRT; Team) was formed to review the status of the species and the report (Oleson *et al.,* 2010) (hereafter ''status review report'') was produced and used to generate the proposed rule. Please refer to our Web site (see **FOR FURTHER INFORMATION CONTACT**) for access to the status review report and the reevaluation of the DPS designation (discussed later), which details MHI insular false killer whale biology, ecology, and habitat, the DPS determination, past, present, and future potential risk factors, and overall extinction risk.

On November 17, 2010, we proposed to list the MHI insular false killer whale DPS as an endangered species under the ESA (75 FR 70169), and solicited comments from all interested parties including the public, other governmental agencies, the scientific community, industry, and environmental groups. Specifically, we requested information regarding: (1) Habitat within the range of the insular DPS that was present in the past, but may have been lost over time; (2) biological or other relevant data concerning any threats to the MHI insular false killer whale DPS; (3) the range, distribution, and abundance of the insular DPS; (4) current or planned activities within the range of the insular DPS and their possible impact on this DPS; (5) recent observations or sampling of the insular DPS; and (6) efforts being made to protect the MHI insular false killer whale DPS. The proposed rule also provides background information on the biology and ecology of the MHI insular false killer whale.

Since the publication of the proposed rule in November 2010, we have identified a previously unrecognized Northwestern Hawaiian Islands (NWHI) population of false killer whales and have received updated satellite tagging information and other new research papers on the MHI insular population. The new NWHI population has been identified as a separate stock for management purposes in the draft 2012 SAR (Carretta *et al.,* 2012b). Because this new information could be relevant to the final determination of whether the MHI insular false killer whale qualifies as a DPS for listing under the ESA, on September 18, 2012, we published a Notice of Availability in the **Federal Register** (77 FR 57554) announcing the availability of this new information and the reopening of public comment for a 15-day period pertaining to the new information. We received comments from 15 commenters during this reopened period. Summaries of these comments are included below

along with public comments received in response to the proposed rule.

Determination of Species Under the ESA

The ESA defines ''species'' to include subspecies or a DPS of any vertebrate species which interbreeds when mature (16 U.S.C. 1532(16)). The FWS and NMFS have adopted a joint policy describing what constitutes a DPS of a taxonomic species (61 FR 4722; February 7, 1996). The joint DPS policy identifies two criteria for making DPS determinations: (1) The population must be discrete in relation to the remainder of the taxon (species or subspecies) to which it belongs; and (2) the population must be significant to the remainder of the taxon to which it belongs.

A population segment of a vertebrate species may be considered discrete if it satisfies either one of the following conditions: (1) ''It is markedly separated from other populations of the same taxon as a consequence of physical, physiological, ecological, or behavioral factors. Quantitative measures of genetic or morphological discontinuity may provide evidence of this separation''; or (2) ''it is delimited by international governmental boundaries within which differences in control of exploitation, management of habitat, conservation status, or regulatory mechanisms exist that are significant in light of section 4(a)(1)(D)'' of the ESA.

If a population segment is found to be discrete under one or both of the above conditions, its biological and ecological significance to the taxon to which it belongs is evaluated. Considerations under the significance criterion may include, but are not limited to: (1) ''Persistence of the discrete population segment in an ecological setting unusual or unique for the taxon; (2) evidence that the loss of the discrete population segment would result in a significant gap in the range of a taxon; (3) evidence that the discrete population segment represents the only surviving natural occurrence of a taxon that may be more abundant elsewhere as an introduced population outside its historical range; and (4) evidence that the discrete population segment differs markedly from other populations of the species in its genetic characteristics'' (61 FR 4725; February 7, 1996).

The ESA defines an ''endangered species'' as one that is in danger of extinction throughout all or a significant portion of its range, and a ''threatened species'' as one that is likely to become an endangered species in the foreseeable future throughout all or a significant portion of its range (16 U.S.C. 1532 (6) and (20)). The statute requires us to determine whether any species is endangered or threatened because of any of the following factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence (16 U.S.C. 1533(a)(1)). We are to make this determination based solely on the best available scientific and commercial information after conducting a review of the status of the species and taking into account any efforts being made by states or foreign governments to protect the species.

Re-Evaluation of DPS Determination

The ESA requires that we make listing determinations based solely on the best available scientific and commercial information (16 U.S.C. 1533(b)(1)(A)). Upon consideration of comments raised during the first and second public comment period, and upon review of the new NWHI stock information and the new research papers identified in the **Federal Register** notice reopening public comment on the proposed rule, and to ensure that the best available information was considered, we reconvened the BRT. As we did in the original status review, we asked them to use the criteria in the joint NMFS–U.S. Fish and Wildlife Service DPS policy (61 FR 4722; February 7, 1996), to evaluate whether, in light of this new information regarding the NWHI population, and other information, the proposed Hawaiian insular false killer whale DPS, as previously described, continues to meet the criteria of a DPS. The BRT defined a DPS finding as support for discreteness and significance by at least five of the eight Team members, and at least 50 percent of the plausibility points (see the status review report for formal methods used for the DPS assessment). The BRT updated and reevaluated the original findings with respect to the discreteness and significance criteria in light of the new information available since the 2010 status review.

Following an evaluation of all available information on MHI insular, NWHI, and pelagic false killer whales, the BRT found that the MHI insular population of false killer whales continues to meet the discreteness and significance criteria to be considered a DPS under the ESA. The BRT's determination of ESA discreteness and significance are summarized below. The complete decision analysis can be found in the Reevaluation of the DPS Designation for Hawaiian (now Main Hawaiian Islands) Insular False Killer Whales (Oleson *et al.,* 2012). Please see our Web site (see **FOR FURTHER INFORMATION CONTACT**) to access this document.

The BRT found that MHI insular false killer whales continue to meet the discreteness criteria due to marked separation from other false killer whales based on behavioral and genetic factors. This finding is supported by evaluation of new information on individual association patterns, genetics, phylogeographic analysis, and telemetry data in addition to the original information detailed in the proposed rule. In particular, MHI insular false killer whales form a tight social network, with most identified individuals linked to all others through at least two distinct associations and with none of the identified individuals linking to animals outside of the nearshore areas of the MHI. These association data are strong and relate directly to the mating patterns and the resulting genetic patterns that have been observed. Further, phylogeographic analysis indicates that the MHI insular population is nearly isolated with little, if any, emigration of females between adjacent island-associated populations. Additionally, significant differences occur in mitochondrial (mtDNA) and nuclear DNA (nDNA) between the MHI insular population and the other populations, indicating there is little male-mediated gene flow. Finally, telemetry studies show all 27 satellite-tagged MHI insular false killer whales have remained within the MHI (Baird *et al.,* 2012), and consist of three primary social clusters with different primary habitats.

Several BRT members noted that there is still uncertainty about false killer whale behavior and the association of the MHI insular and NWHI populations; however, the BRT concluded that the weight of the evidence continues to strongly support recognition of MHI insular false killer whales as behaviorally discrete from other false killer whales in the taxon (Oleson *et al.,* 2012).

Unlike in the original DPS determination the BRT found only weak support for finding discreteness based on ecological factors. Although movement data continues to indicate that MHI insular false killer whales have adapted to a different ecological habitat than their pelagic conspecifics, BRT members were less persuaded that this ecological setting is unique under the DPS policy, given the existence of an

island-associated population within the NWHI.

As for the significance criteria, the BRT again found support for the conclusion that MHI insular false killer whales are significant to the taxon to which they belong. Significance to the taxon was based primarily on marked genetic characteristic differences, although weaker support for existence in a unique ecological setting and maintenance of cultural diversity was also evident. Further, the BRT continued to find slightly stronger support for significance based on all three factors taken together (Oleson *et al.,* 2012).

Based on new genetic samples from the MHI, the NWHI and nearby central North Pacific areas (Chivers *et al.,* 2011; Martien *et al.,* 2011), the BRT found stronger support that MHI insular false killer whales differ markedly from other populations of the species in their genetic characteristics. The magnitude of mitochondrial (mtDNA) differentiation is large enough to infer that time has been sufficient and gene flow low enough to allow adaptation to MHI insular habitat and that the area would not be readily repopulated by pelagic whales without such adaptation. MHI insular false killer whales exhibit strong phylogeographic patterns that are consistent with a founding event for island-associated false killer whales, followed by local evolution of a mitochondrial haplotype unique to the MHI insular population. Although NWHI false killer whales share one haplotype with MHI insular false killer whales, each population is also characterized by its own unique daughter haplotype. Occurrence of a unique daughter haplotype within a relatively small sample from the NWHI population is significant as nearly two-thirds of individuals in the MHI insular population have been sampled without any evidence of this haplotype in that population. The nDNA also continue to suggest strong differentiation of the MHI insular population, perhaps even stronger than in the initial evaluation because of new information on whales in the NWHI. A Bayesian analysis (using the software program STRUCTURE) using all sampled false killer whale populations (Chivers *et al.,* 2011) indicated separation into two populations—the MHI insular population and all others, including the NWHI island-associated animals. The same STRUCTURE analysis indicates that male-mediated gene flow into the MHI insular population from false killer whales in other areas, including island-associated animals in the NWHI, is at a very low level (Oleson *et al.,* 2012). The nDNA results suggest very low gene flow from other populations, such that individually sampled MHI insular false killer whales can be genetically assigned to the MHI insular population with high likelihood.

The BRT acknowledged that uncertainty remains in the genetic comparisons of the MHI insular population to other Pacific false killer whales. Although the MHI insular population is very well sampled with roughly two-thirds of the individuals represented, pelagic false killer whale genetics contain large sampling gaps to both the west and east of Hawaii, and uncertainty remains about the structure of the NWHI population. Low levels of male-mediated gene flow were identified based on genetic results. Despite these uncertainties, the available sample size from Hawaiian false killer whales (MHI, NWHI, and pelagic) is substantial and overall the Team felt that significant differences based on multiple measures were noteworthy and that it is unlikely that new samples will significantly alter the overall story toward more similarity between these groups. Therefore, the weight of the evidence available was in favor of marked differentiation in genetic characteristics between the discrete MHI insular false killer whale population and other populations of the species, thus making the MHI population significant to the taxon (Oleson *et al.,* 2012).

In the 2010 status review, the BRT found reasonably strong support for significance based on persistence in a unique ecological setting and for significance of cultural uniqueness. Both of these factors still provide support for the significance determination; however, they are weaker than in the initial evaluation, primarily because of uncertainties raised with the existence of another island-associated population in the NWHI. Factors that support ecological significance include the influence of different oceanographic factors, such as leeward eddies and freshwater input, which result in localized higher productivity in the MHI but which do not occur in the NWHI. Habitat analyses indicate that clusters of false killer whales preferentially use the northern coast of Molokai and Maui, the north end of the Big Island, and a small region southwest of Lanai (Baird *et al.,* 2012). This behavior suggests that whales may seek out areas where prey are concentrated by local oceanographic conditions. The MHI insular false killer whales appear to generally occur closer to land and in shallower water than the whales in the NWHI population, which may be related to differences in oceanographic conditions in the two locations. The BRT noted uncertainty with regard to the relationship between these seemingly unique MHI oceanographic processes and the ecology of a pelagic predator such as false killer whales. The BRT assigned plausibility points in favor of significance based on ecological setting, but noted the greater uncertainty about this factor than in the original DPS evaluation (Oleson *et al.,* 2012).

The BRT still found that culture (knowledge passed through learning from one generation to the next) is likely to play an important role in the evolutionary potential of false killer whales because transmitted knowledge may help whales adapt to changes in local habitats. However, the finding was weaker than in the previous evaluation due to the lack of information on cultural differences between the MHI insular and NWHI populations. While some Team members noted that cultural transmission is a strong force in social odontocetes, playing a significant role in population structure and persistence, others thought that there was insufficient evidence of specific differences in cultural aspects of the MHI and NWHI populations. Uncertainty was represented within the BRT's evaluation of culture, though overall the Team did find weak support for cultural significance (Oleson *et al.,* 2012).

The BRT discussed that while there is independent support for ecological and cultural factors for significance, they concluded that these factors taken alone do not provide strong support for significance of the DPS. However, the combination of ecological and cultural factors, taken together with the stronger genetic evidence, provided slightly greater support for significance of the DPS than the genetics alone by increasing the Team's confidence that the population is unique. As in the 2010 status review, the BRT separately evaluated the significance criteria based on all of the factors taken together and found that the particular combination of qualities makes this population unique; the MHI insular population has adapted to this particular environment in a way that likely has not and cannot occur with this species anywhere else in the world. The BRT emphasizes that, even without considering ecological and cultural factors, the significance factor is met because MHI insular false killer whales differ markedly from other populations of the species in their genetic characteristics (Oleson *et al.,* 2012).

One BRT member dissented on both discreteness and significance. The dissenting opinion (documented in full in the Reevaluation of the DPS Designation (Oleson *et al.,* 2012)) was that the recommendation for a DPS finding gave too much weight to genetic evidence, and that the genetic evidence was not sufficiently convincing due to substantial uncertainties in the data. In particular, the dissent noted that only four NWHI false killer whales had been genetically sampled, which could be an insufficient sample to establish whether the differences in genetics indicate a true separation of the NWHI population from the MHI insular population. The dissent also noted that there are also large sampling gaps in the pelagic population. The dissent noted that the mitochondrial DNA haplotypes found in the MHI insular population could be found elsewhere in the inadequately sampled areas. Further, inadequate sampling may also create bias in the data against detecting male-mediated gene flow, which could reduce the likelihood that the MHI insular population adapted to the local habitat.

Summary of Evaluation of DPS Determination

The ESA instructs us to rely on the best available science, even when that information is uncertain or incomplete. While we acknowledge the data gaps detailed in Oleson *et al.* (2012), we believe that the BRT has appropriately considered uncertainty in reaching the DPS finding. The data relied upon represents the best available information to NOAA in making this determination. Although the dissenting BRT member notes that the mitochondrial DNA haplotypes found in the MHI insular could be found elsewhere in other unsampled populations, we do not find that the mere possibility of such countervailing data is sufficient to overcome the DPS finding. We conclude that the evidence supporting discreteness and significance based on behavioral and genetic factors, marked genetic characteristic differences, existence in a unique ecological setting, and maintenance of cultural diversity, respectively, between MHI insular false killer whales and their conspecifics supports a DPS designation.

The BRT was not charged to reconsider its earlier extinction risk analysis (Oleson *et al.,* 2010), and we have no reason to disturb that analysis.

The public may wish to visit our Web site (see **FOR FURTHER INFORMATION CONTACT**) for a copy of the Reevaluation of the DPS Designation for Hawaiian (now Main Hawaiian Islands) Insular False Killer Whales (Oleson *et al.,* 2012). This reevaluation summarizes the new scientific information available since the completion of the status review report in 2010, provides an update on Hawaiian false killer whale taxonomy, biology, and ecology, and includes a DPS determination, evaluation, and scores.

Relevant Background Information Pertaining to the Marine Mammal Protection Act

Hawaiian insular false killer whales are marine mammals and thus protected under the MMPA. Some comments on the proposed rule reference issues related to the MMPA and our evaluation of conservation efforts considers a number of MMPA programs, so this section briefly provides relevant background information. More detailed information on the MMPA can be found on our Web site at *http://www.nmfs.noaa.gov/pr.*

The MMPA requires stock assessments for each marine mammal stock that occurs in U.S. waters. As of the publication of this final rule, the most recent stock assessment reports (SARs) are the final 2011 SAR and the draft 2012 SAR (Carretta *et al.,* 2012a; 2012b). The final 2012 SAR is anticipated to be published in the **Federal Register** in the spring or summer of 2013.

The MMPA requires NMFS to develop and implement take reduction plans to assist in the recovery or prevent the depletion of strategic marine mammal stocks. Strategic stocks are those for which the level of direct human-caused mortality exceeds the potential biological removal (PBR) level, which is declining and is likely to be listed as a threatened species under the ESA within the foreseeable future, or which is listed as a threatened species or endangered species under the ESA. PBR is the maximum number of animals, not including natural deaths, that can be removed annually from a stock, while allowing that stock to reach or maintain its optimum sustainable population level. The immediate goal of a take reduction plan is to reduce, within six months of its implementation, the incidental mortality or serious injury (M&SI) of marine mammals from commercial fishing to levels less than the PBR level established for that stock. The long-term goal is to reduce, within five years of its implementation, the incidental M&SI of marine mammals from commercial fishing operations to insignificant levels approaching a zero M&SI rate (50 CFR 229.2 establishes a default insignificance value of 10 percent of the PBR for a stock of marine mammals). On July 18, 2011, NMFS published a proposed False Killer Whale Take Reduction Plan (proposed FKWTRP; 76 FR 42082) to reduce serious injuries and mortalities of false killer whales in the Hawaii-based deep-set and shallow-set longline fisheries. A final Take Reduction Plan and implementing regulations are expected shortly.

Summary of Comments Received in Response to the Proposed Rule

On November 17, 2010, we solicited public comments on the proposed listing of the MHI insular false killer whale DPS for a total of 90 days (75 FR 70169). A public hearing on the proposed rule was held on January 20, 2011, in Honolulu, Oahu, Hawaii. We received comments on the proposed rule from 53,408 commenters; over 53,000 of these submissions were substantially identical form letters. As previously mentioned, new information on a NWHI population became available before our MHI population final listing determination was made and on September 18, 2012, we solicited public comments on that new data (77 FR 57554). We received comments on the new information from 15 commenters. Public comments on the proposed rule and on the new information are available at: *www.regulations.gov* (search on ID NOAA–NMFS–2009–0272–0022). Summaries of the substantive comments received, and our responses, are provided below, organized by category.

In December 2004, the Office of Management and Budget (OMB) issued a Final Information Quality Bulletin for Peer Review establishing minimum peer review standards, a transparent process for public disclosure, and opportunities for public input. Similarly, a joint NMFS/FWS policy for peer review in ESA activities requires us to solicit independent expert review from at least three qualified specialists, concurrent with the public comment period (59 FR 34270; 1 July 1994). In accordance with these policies, we solicited technical review of the proposed rule from three qualified specialists. Comments were received from one of the independent experts and those substantive comments are addressed below.

Independent Peer Reviewer Comments

Comment 1: The discussion of threats, specifically pollutants, anthropogenic noise, disease from environmental contaminants, and climate change, is extremely speculative. These are threats faced by most cetacean populations and for most there is little or no direct evidence linking any of them to a cetacean population decline.

Response: We believe that because the threats referenced by the commenter are faced by all cetacean populations they must be acknowledged and evaluated in order to fully assess the risk of extinction for this population of MHI insular false killer whales. Moreover, there is ample evidence that pollutants, anthropogenic noise, and environmental contaminants represent a risk to cetacean populations. Cetaceans have been found stranded with plastic bags or other forms of plastic blocking their airways or in their stomach. Shipping noise and military sonar have been repeatedly shown to disrupt foraging and communication, as well as cause disorientation or death for a variety of species. Environmental contaminants have been shown to occur at very high levels in insular false killer whales and are known to cause immune system dysfunction in the closely related species, killer whales. Therefore, even though individually these factors may not be a significant threat to this population, we consider the cumulative impact of the threats to be a risk factor based on the best available information.

Comment 2: Mitochondrial DNA (mtDNA) differences between Hawaii pelagic and insular populations are quite high. However, the amount of nuclear differentiation presented in Chivers *et al.* (2010) is quite low. Furthermore, the nDNA analysis did not correct for multiple pairwise tests and when that is done, there is no significant differentiation between these two stocks. This suggests there may be quite a lot of male-mediated gene flow between these two stocks, reducing the support for the discreteness determination. Finally, while there is disagreement on the use of the Bonferroni technique for controlling for multiple pairwise comparisons, there is little disagreement on the need to apply some correction for multiple tests.

Response: We agree that the amount of nuclear differentiation presented in Chivers *et al.* (2010) is low. Moreover, whether F-st (Fixation index—a measure of population differentiation due to genetic structure) and its analogs actually measure genetic differentiation is currently being debated in the literature. However, the levels detected were reasonably within the range of what would be expected from the level of mtDNA genetic differentiation detected, when corrected for mutation rate. With respect to correcting for multiple pairwise tests, the application of a correction factor was not considered appropriate because pairwise comparisons of putative populations were considered independent and they effectively reduce the Type I error rate. The tradeoff of the latter is to increase Type II error rates, and thus the risk of erroneously interpreting test statistics. Furthermore, Chivers *et al.* (2011) conducted a Bayesian analysis (STRUCTURE) using all sampled false killer whale populations and the results indicated separation into two populations—the MHI insular population and all others, including the newly recognized NWHI island-associated animals. The same STRUCTURE analysis indicates that male-mediated gene flow into the MHI insular population from false killer whales in other areas, including island-associated animals in the NWHI, is at a very low level. The nDNA results suggest very low gene flow from other populations, such that individually sampled MHI insular false killer whales can be genetically assigned to the MHI insular population with high likelihood. Please refer to our responses to Comments 8 and 9 for further information.

Public Comments From the First Public Comment Period

Nearly all public comments received during the first public comment period on the proposed rule (75 FR 70169; November 17, 2010) were some form of a form letter or petition and were in favor of listing the MHI insular false killer whale DPS as an endangered species. With respect to the remaining public comments, which were substantive, we have responded to these through our general responses below. Substantive comments were received from seven groups: two research, conservation, and education groups; the Humane Society; the Marine Mammal Commission; the State of Hawaii; the Western Pacific Regional Fishery Management Council; and the Hawaii Longline Association.

In the proposed rule, we solicited information from the public to inform the designation of critical habitat in the event the DPS was listed. The comments received concerning critical habitat are not germane to this listing decision and will not be addressed in this final rule. They will instead be addressed during any subsequent rulemaking on critical habitat for the MHI insular false killer whale DPS.

Scientific and Legal Standards Pertaining to the Main Hawaiian Islands Insular False Killer Whale DPS

Comment 3: One commenter questioned the legal standards of the proposed rule, stating that applicable law requires NMFS, at a minimum, to provide its interpretation of the ''endangered'' definition; explain how its interpretation conforms to the text, structure, and legislative history of the ESA; explain how its interpretation is consistent with judicial interpretations of the ESA; explain how its interpretation serves policy objectives; and address whether its interpretation could undermine those policy objectives. The commenter stated that because the proposed rule fails to engage in this analysis, NMFS must reconsider the proposed rule and re-issue a new proposed rule or a not warranted finding.

Response: Section 4 of the ESA requires us to determine whether any species is an endangered species or a threatened species because of any of the ESA section 4(a)(1) listing factors. An ''endangered species'' is ''any species which is in danger of extinction throughout all or a significant portion of its range.'' A ''threatened species'' is ''any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.'' In the proposed rule, we explained the present demographic risks establishing that the [MHI] insular false killer whale is ''in danger of extinction'' and therefore should be listed as ''endangered.''

We disagree that case decisions, including *In re Polar Bear Endangered Species Act Listing and Section 4(d) Rule Litigation,* 748 F. Supp. 2d 19 (D.D.C. 2010), indicate that the proposed rule was insufficient with respect to defining ''endangered'' and ''threatened.'' The legislative history of the ESA indicates Congress left to the discretion of the Services (NMFS and the U.S. Fish and Wildlife Service; collectively ''Services'') the task of giving meaning to the terms through the process of case-specific analyses that necessarily depend on the Services' expertise to make the highly fact-specific decisions to list species as endangered or threatened. The polar bear decision confirmed this interpretation and specifically noted that the inherent ambiguity in the definition of ''endangered species'' affords the listing agency flexibility when adapting the policy to fit ''infinitely variable conditions,'' based on its technical expertise in the area and on the specific facts of the case. *Id.* at 27 (quoting *Lichter* v. *United States,* 334 U.S. 742, 785 (1948)). Far from requiring an agency to set forth a particular definition, the court noted that the agency has broad discretion to determine species' status in light of the five statutory listing requirements of ESA section 4. *Id.* at 28.

Although Congress did not seek to make any single factor controlling when

drawing the distinction, Congress included a ''temporal element to the distinction between the categories.'' *In Re Polar Bear Endangered Species Act Listing and Section 4(d) Rule Litigation,* 794 F. Supp. 2d 65, 85 n.24, 89 & n.27 (D.D.C. 2011). Accordingly, in the context of the ESA, we interpret an ''endangered species'' to be one that is presently at risk of extinction. A ''threatened species,'' on the other hand, is not currently at risk of extinction, but is likely to become so. In other words, a key statutory difference between a threatened and endangered species is the timing of when a species may be in danger of extinction, either now (endangered) or in the foreseeable future (threatened).

In this case, we applied a case-specific interpretation of ''endangered'' and utilized the best available data to analyze the ESA section 4 factors in light of the MHI insular false killer whale's particular circumstances. This approach conforms with the ESA's requirement for species-specific status reviews (16 U.S.C. 1533(b)(1)(A)). Whether a species is ultimately listed as an endangered species depends on the specific life history and ecology of the species, the nature of the threats, the species' response to those threats, and population numbers and trends.

In the proposed rule, we explained that the [MHI] insular false killer whale population is presently in danger of extinction due to a number of currently-existing ESA section 4 risk factors. For example, we noted that its small population size when compared to historical data indicates that the population has declined over the last two decades, and small populations are particularly susceptible to environmental threats and inbreeding depression. The population is genetically isolated from both the Hawaiian pelagic and the NWHI false killer whales, with little gene flow into the MHI insular population from other areas. The MHI insular false killer whale exhibits strong habitat specialization and social structure, rendering the population vulnerable to competition for resources and habitat in relatively shallow waters, and to loss of individual members with corresponding loss of knowledge transfer within the population. Competition with fisheries, interactions with fisheries, the impacts of reduced total prey biomass, and contaminants are also risk factors for the population and its habitat.

In light of the foregoing, we believe that MHI insular false killer whales have experienced a decline in numbers as a result of factors that have not been abated, that show no evidence of stabilization, and currently place the population in danger of extinction. Any event that reduces survival (e.g., disease outbreak, oil spill) can adversely affect the entire group because: the whales reproduce only every 6 or 7 years and become reproductively senescent in their mid-40s; the estimated effective population size is only about 50 breeding adults (Chivers *et al.,* 2010; Martien *et al.,* 2011); they are genetically isolated from the pelagic and the NWHI population; and because individual false killer whales are usually near their group and in close association with one another. Moreover, the DPS historically has faced or currently/in the future faces 29 potential threats, 15 of which are significant and 2 of which are most significant (including small population effects, and hooking, entanglement, and acts of prohibited take by fishers).

Finally, the BRT determined, and we agree, that the small population size and evidence of a decline in the species, combined with several factors that are likely to continue to have, or have the potential to adversely impact the population in the near future, describe a population that is at high risk of extinction. High risk of extinction was defined by the BRT as within 3 generations (75 years) or the maximum age, whichever is greater, that there is at least a 5 percent chance of the population falling below a level where recovery is not likely. Because false killer whales are highly social animals, this level was set at 20 animals, which is about the average group size.

The imminence of these threats is just one factor to be weighed in this process. Although we find a high risk of extinction where there is at least a 5 percent chance of the population falling below a level where recovery is not likely, in this case we found that most Population Viability Analysis (PVA) models exceeded the 5 percent chance of extinction in 75 years by a very wide margin, with most indicating a greater-than-90 percent chance of extinction within 3 generations (Oleson *et al.,* 2010). This population level would result in functional extinction beyond the point where recovery is possible. Accordingly, we have determined that this DPS warrants listing as an endangered species under the ESA because it is currently in danger of becoming extinct within three generations.

Comment 4: One commenter questioned the use of the best available scientific and commercial data, stating that the proposed listing of the Hawaiian insular false killer whale is based, in large part, on ''uncertain or inconclusive'' information. The commenter noted that available information regarding stock structure, range, and abundance of Hawaiian insular false killer whales is significantly limited, contains substantial data gaps, and is low in confidence and high in uncertainty.

Response: Listing decisions under ESA section 4 are to be made utilizing the best scientific and commercial data available (16 U.S.C. 1533(b)(1)(A)). This standard ensures that the agency will not disregard available scientific evidence that is in some way better than the information it relies upon. However, scientific uncertainty is present in nearly every listing decision, and NMFS is not foreclosed from making a decision that is based on, in whole or in part, incomplete or imperfect scientific information.

NMFS acknowledges that while there are substantial data gaps for some aspects of MHI insular false killer whale ecology and abundance, the available data do allow a proper assessment of whether this population is a DPS. Uncertainty and alternative viewpoints are explicitly acknowledged by the BRT in the original DPS analysis and are described in Appendix A of the status review report, as well as in the Reevaluation of the DPS Designation for Hawaiian (now Main Hawaiian Islands) Insular False Killer Whales (Oleson *et al.,* 2012). The best available data shows that the DPS is presently in danger of extinction because of meeting four of the five ESA section 4(a)(1)(b) factors, including significant demographic risks as explained in our Response to Comments 3 and 9. As such, we find that the DPS warrants listing as endangered.

Status of the Main Hawaiian Islands Insular False Killer Whale DPS

Comment 5: The State of Hawaii was concerned about the profound effects to state programs from listing the Hawaiian insular false killer whale DPS as an endangered species.

Response: We acknowledge that listing the Hawaiian insular false killer whale DPS as an endangered species could potentially affect State of Hawaii programs, and we would work with the State to minimize associated impacts.

We are working with the State of Hawaii through an ESA section 6 cooperative agreement and grant funding to prevent and document nearshore fishery interactions with Hawaiian monk seals and sea turtles. The State is evaluating fishery interactions in mainly shore-based hook-and-line gear and gillnets, and is characterizing these fisheries in terms of

their effort, gear, target species, and likelihood of impacts to protected species. Through the cooperative agreement, the State is developing a pilot take reporting and monitoring system, and assessing current and future regulatory and non-regulatory alternatives for fishery take reduction and monitoring. The State, in coordination with the NMFS Pacific Island Regional Office and NMFS Pacific Islands Fisheries Science Center, also provides education and outreach to Hawaii's fishermen on protected species, including communication with sport and commercial fishing organizations and clubs, as well as environmental groups. Through listing the MHI insular false killer whale under the ESA there is the potential to expand the scope of Hawaii's ESA section 6 cooperative agreement to include this species.

We will continue to work with the State of Hawaii and other partners to assess and address marine mammal interactions in state-managed fisheries.

Comment 6: One commenter asserted that as the science continues to develop, it is becoming more apparent that insular and pelagic false killer whales overlap and intermingle throughout a significant portion of their range. Thus, the best available evidence is too uncertain to designate the insular population as a DPS.

Response: NMFS disagrees that the data are too uncertain to designate the MHI insular population as a DPS. NMFS does acknowledge, however, that recent satellite-telemetry studies, and as stated in the draft 2012 SAR (Carretta *et al.,* 2012b), the insular and pelagic populations of false killer whales do overlap in their geographic range from 40 km to 140 km off the Main Hawaiian Islands. Additionally, the draft 2012 SAR (Carretta *et al.,* 2012b) identifies a new island-associated population of false killer whales that inhabits the NWHI, and photo-identification and satellite tagging results suggest that false killer whales from the NWHI population geographically overlap with MHI insular false killer whales near Kauai (Baird *et al.,* 2012; Carretta *et al.,* 2012b). Despite the geographic overlap, significant differences in the populations exist as described in the DPS reevaluation discussed above and in Oleson *et al.* (2012). Therefore, although insular and pelagic populations may geographically ''intermingle'' with one another (as well as with the NWHI population), the assertion that insular and pelagic false killer whales genetically ''intermingle'' is not supported (nor do they genetically ''intermingle'' with NWHI false killer whales), and this is further discussed in response to Comment 7 (below).

Comment 7: Similar to Comment 2 made by the peer reviewer, one public commenter asserted that nDNA purportedly supporting discreteness is not consistent with Chivers *et al.* (2010), stating that while the authors found that limited mtDNA samples provided some suggestion of discreteness, the nDNA data does not suggest discreteness.

Response: NMFS disagrees with the commenter's characterization of the Chivers *et al.* (2010) data. Chivers *et al.* (2010) (and also Chivers *et al.,* 2011) does show strong differentiation in maternally-inherited mtDNA between the MHI insular and the other adjacent NWHI and pelagic populations. This indicates there is little, if any, emigration of females between these populations. Additionally, Chivers *et al.* (2011) found that there are significant differences in nDNA between the MHI insular and the other populations, indicating there is little male-mediated gene flow (either emigrating or mating), from any other population including island-associated NWHI animals. The MHI population is as different from the NWHI population as it is from the other more distant strata (supported by both F-st and Structure results). These data are consistent with the notion of two insular Hawaiian populations that now have little gene flow and that represent a mtDNA lineage that has been separated from all other false killer whale populations for a substantial period of time (Oleson *et al.,* 2012).

Threats to the Main Hawaiian Islands Insular False Killer Whale DPS

Comment 8: One commenter included five recommendations for protecting Hawaiian insular false killer whales from fisheries interactions: 100 percent observer coverage in the Hawaii-based longline fisheries; the required use of circle or weak hooks; prohibiting longline fishing within the entire range of the Hawaiian insular population of false killer whales; establishing a false killer whale sightings reporting system; and addressing potential impacts of inshore fisheries through the False Killer Whale Take Reduction Team (FKWTRT).

Response: This action concerns the listing decision for the MHI insular false killer whale under the ESA; the development of conservation and management measures for protecting the DPS from fisheries interactions is beyond the scope of this rulemaking. However, NMFS is finalizing a take reduction plan to reduce commercial fishery impacts on Hawaii's pelagic and MHI insular whales. The public may access a copy of the proposed plan and proposed implementing regulations from our Web site (see **FOR FURTHER INFORMATION CONTACT**). We will also prepare a recovery plan for the species after the species is listed.

Comment 9: One commenter felt that while it is difficult to address threats posed by reduced genetic diversity or the as yet unquantified impacts from climate change, the degree to which these threaten the DPS should be further studied.

Response: The ongoing and potentially changing nature of pervasive threats, in particular, effects from climate change, potential limits on prey availability, and reduced genetic diversity, certainly need to be further studied especially given uncertain future ocean conditions. These and other risks are unlikely to decline (and are likely to increase in the future). And while the population may not be naturally large compared to other cetaceans, the population has decreased, and thus the intensity of the threats is increased by the small number of animals currently in the population. The combination of factors responsible for past population declines are uncertain, may continue to persist, and could worsen before conservation actions are successful, which could potentially preclude a substantial population increase. In sum, we concur that all threats should continue to be further studied.

Comment 10: One commenter felt that a biased interpretation of prey abundance and competition based on fishery-dependent catch-per-unit-effort (CPUE) data resulted in exaggerated threats. The commenter felt that alternative explanations of changes in CPUE and prey size were not considered or analyzed by NMFS.

Response: This commenter's suggested alternative explanations of CPUE changes (e.g., altered handline targeting) are not supported by any existing analysis or publications, and are speculative. All information and interpretation of Hawaii pelagic fish abundance come from CPUE data and commercial fish catch size data. No independent analysis of biomass is possible, given the data currently available, except the more thorough stock-wide assessments that include Hawaii fish. Stock-wide assessments also use semi-independent tagging data, and evaluate alternative analyses of CPUE changes with various CPUE standardizations, all suggesting reduced population biomass. The level of risk is assigned based on credibility, with acknowledged high uncertainty. We therefore disagree that the interpretation

of prey abundance and competition based on use of CPUE metrics is exaggerated.

Comment 11: Several commenters asserted that the proposed rule unjustifiably assigns the commercial longline fishery as having a higher risk to insular false killer whales, compared to the risk assigned to it in the status review report completed by the BRT. Another commenter stated there is an incorrect assessment of alleged interactions between commercial longline fisheries and insular false killer whales, stating there is no evidence showing that commercial longline fisheries have ever had an interaction with an insular animal, despite high rates of observer coverage; that there has been only one documented interaction with a false killer whale that occurred in or near the geographic range identified for the insular stock and that interaction was classified as non-serious; and that the interaction, for which no genetic sample was obtained, likely involved a pelagic animal since the best available science does not reasonably support the conclusion that the interaction involved an insular population animal. Finally, this commenter stated that NMFS' attribution of that interaction to the insular stock directly contradicts a statement (from what we assume is from the status review report, although the exact quote is not in the status review report) that ''false killer whale bycatch or sightings by observers aboard fishing vessels cannot be attributed to the insular population when no identification photographs or genetic samples are obtained.''

Response: NMFS disagrees that only one interaction has occurred and that it is outside the insular population boundary. In the shallow-set fishery between 2000 and 2011, there were no interactions with false killer whales or ''blackfish'' in the insular-pelagic overlap zone. However, in the deep-set longline fishery between 2000 and 2011 there were three observed interactions with false killer whales within the insular-pelagic stock overlap zone (two serious injuries in 2003, and one non-serious injury in 2006). There have also been three observed interactions within the overlap zone with unidentified ''blackfish'' (serious injuries in 2003 and 2006, and one in 2005 where injury severity could not be determined (McCracken, 2010a; 2010b; 2011; Forney, 2010; 2011; NMFS, unpublished data). Blackfish interactions are now prorated to species and counted in mortality and serious injury estimates for false killer whales and pilot whales in the draft 2012 SAR (Carretta *et al.,* 2012b). Based on these data, the most recent estimate of total annual interactions with the MHI insular population between 2006 and 2010 is estimated at 0.50 animals per year (Carretta *et al.,* 2012b).

It is correct, however, that no genetic samples are available from animals that have interacted with the fishery within the insular-pelagic population overlap zone. Genetic sampling provides a useful and reliable method for positively accounting for marine mammal interactions, but like identification photographs, the method is available for only a small fraction of bycaught individuals. Accordingly, the lack of genetic evidence raises uncertainty in the estimates of actual interaction rates; it does not suggest that interactions with the MHI insular stock are not occurring. The average annual rate of mortality and serious injury (M&SI) of insular false killer whales over the past 5 years of available data is 0.50 animals per year as of the draft 2012 SAR (based on data from 2006–2010, Carretta *et al.,* 2012b). The M&SI estimates are based on proration of interactions to the stock within the overlap zone where both insular and pelagic stocks are known to exist, as well as proration of ''blackfish'' interactions to false killer whales and pilot whales. (Please refer to the response to Comment 8 for information on the distribution of the populations within the overlap zone, which discusses how the populations are not uniformly distributed within the overlap zone but show a gradient.) Proration is an accepted method for assigning mortality and serious injury to a species and stock (NMFS, 2005) and reflects the best information available to us on the rate of interaction between the MHI insular stock and the deep-set longline fishery.

The potential biological removal (PBR) level for the MHI insular population was recently revised to 0.30 whales per year in the draft 2012 SAR (Carretta *et al.,* 2012b). The estimated rate of interaction from longline fisheries alone exceeds PBR, and this stock is considered ''strategic'' under the MMPA. Refer to responses to Comments 14 and 15 for more information on PBR.

Finally, the statement from the status review report is taken out of context. The correct quote follows from discussion of population attribution based on aerial surveys and states ''* * * sightings of false killer whales by observers aboard fishing vessels cannot be attributed to the insular population when no identification photographs are obtained.'' The statement refers only to the inability to assess population range based on fishery observer sightings, not to appropriate methods for prorating bycatch, nor to the potential for bycatch from the MHI insular stock given its occurrence within the insular-pelagic overlap zone.

Comment 12: One commenter asserted that direct and indirect inferences of commercial longline fishery interactions with the insular population are not supported. According to the commenter, each of the following statements is speculative and lacks factual support: ''a few interactions closer to the Main Hawaiian Islands may have involved insular animals''; ''historically more frequent interactions may have occurred''; with reference to the longline exclusion zone, ''decline of the insular DPS has still occurred''; and ''the greatest threats to the insular population are small population effects and hooking, entanglement, or intentional harm by fishermen.''

Response: The statement ''a few interactions closer to the Main Hawaiian Islands may have involved insular animals'' is factually correct. Based on the objective application of criteria in the draft 2012 SAR (Carretta *et al.,* 2012b), meaning specifically using the location of an interaction to prorate the probability of the interaction with an insular animal within the overlap zone, we conclude that interactions are occurring with MHI insular false killer whales within the insular-pelagic overlap zone based on the geographic range of the population. Refer to response to Comment 11 for more information on interactions between the deep-set longline fishery and insular animals.

As for the quote ''historically more frequent interactions may have occurred,'' the statement continues with ''* * * when there was much greater overlap between insular false killer whales and longline fisheries.'' Prior to the longlining exclusion zone it is likely that there were interactions between longline fisheries and insular false killer whales, given the considerable amount of fishing effort within the population's range. There are no data available to evaluate the level of interactions before 1992, but it is not unreasonable to infer that they may have occurred.

Regarding the statement that a ''decline of the insular DPS has still occurred,'' based on false killer whale encounter rates from the aerial survey data in the 1990s and early 2000s, a downward trend in sightings does suggest a decline in the population, even after the longline exclusion zone was enacted in 1992.

With respect to the statement ''the greatest threats to insulars are small population effects and hooking, entanglement, or intentional harm by fishermen,'' this is the finding of the BRT and we generally concur in the risk analysis, based on all available data and appropriate consideration of uncertainty in each factor. As discussed in the response to Comment 30, although we are aware of reports alleging intentional harm by shooting, a review of agency records does not substantiate these allegations. We do, however, have records documenting unauthorized takes by fishing crew in order to discourage marine mammals from depredating catch. For example, two observer reports document the intentional discharge of diesel oil into ocean waters, which is reasonably likely to result in take of protected marine mammal species including the MHI insular false killer whale.

Comment 13: One commenter stated that the draft FKWTRP submitted to NMFS by the FKWTRT in July 2010 includes the extension of the longline exclusion zone to essentially the full range of the insular stock. The commenter concluded that this measure effectively eliminates any risk that the deep and shallow-set longline fisheries may pose to the insular population and, therefore, the fisheries operating pursuant to this draft FKWTRP would not affect, or are not likely to adversely affect, insulars and, thus, the proposed rule directly contradicts this with no reasonable explanation.

Response: NMFS disagrees that the draft FKWTRP eliminates all risk that fisheries may pose to the insular population. It is correct that the FKWTRT noted in their consensus recommendations to NMFS (draft FKWTRP) that an extension of the existing longline exclusion zone (i.e., prohibiting longline fishing year-round in the area where it was previously closed only seasonally) would ''effectively eliminate any risk the deep and shallow-set longline fisheries may pose to the insular stock of false killer whales.'' It is important to note, however, that this was the FKWTRT's statement and not necessarily the position of the Agency.

NMFS' FKWTRP proposed rule would include the extension of the boundaries of the year-round prohibited area for longline fishing (the ''Main Hawaiian Islands Longline Fishing Prohibited Area''). The objective of the FKWTRP is to reduce impacts of commercial fisheries on strategic false killer whale stocks to below each stock's PBR within six months, and ultimately to negligible levels.

However, in the FKWTRP proposed rule, NMFS did not suggest that the risk to insular false killer whales from longline fishing would be eliminated. NMFS believes that not all risk to the MHI insular population has been eliminated because longlining would still be allowed within a portion of the insular-pelagic overlap zone, and because longline fishing is not the only risk factor impacting the population, as discussed further below.

As described in the response to Comment 8 above, since 1992, longline fishing has been excluded year-round from the entire core range of the MHI insular population and part of the extended range (i.e., the area of overlap between the MHI insular and Hawaiian pelagic populations), and further excluded seasonally (February-September) in a large portion of the insular population's extended range. The proposed revised boundary of the Main Hawaiian Islands Longline Fishing Prohibited Area (via the FKWTRP) would further restrict longlining year-round within a portion of the insular population's extended range where longline fishing previously had been allowed between October and January.

Additionally, the Southern Exclusion Zone (SEZ), if triggered by a specified number of observed Hawaii pelagic false killer whale mortalities or serious injuries in the Hawaii-based deep-set longline fishery, would close an area south of the Main Hawaiian Islands within the EEZ to deep-set longline fishing. The SEZ would include a small portion of the insular-pelagic overlap zone in which longline fishing is currently allowed. This closure would offer additional protections from hooking or entanglement in the deep-set longline fishery to any MHI insular false killer whales in the overlap zone when the SEZ is closed.

As discussed above in the response to Comment 4, other measures such as the proposed use of circle hooks with a wire diameter of less than or equal to 4.5 mm (0.177 in) in the deep-set longline fishery, if implemented, are expected to further mitigate this risk.

However, the proposed revision of the Main Hawaiian Islands longline fishing prohibited area boundaries would leave approximately 26 percent of the insular-pelagic overlap zone open to longline fishing, at the offshore edges of the overlap zone (53,992 km^2 or 15,742 nm^2). Even if the SEZ were also closed, 15 percent of the overlap zone would still remain open to longline fishing. Accordingly, even though the FKWTRP is intended to increase protections for MHI insular false killer whales from interactions with longline fishing, this regulatory measure would not eliminate all risks from commercial longline fishing.

Although the objectives of MMPA section 118 complement the conservation goals of the ESA, we do not believe that the protections afforded by the FKWTRP proposed rule would be sufficient to obviate the need for ESA listing. The FKWTRP proposed rule would not address all other identified threats to insulars, even from commercial fisheries. As discussed elsewhere, the MHI insular stock also faces risk by virtue of its low population numbers, inbreeding depression, genetic isolation, contaminants, and disease, among others. We therefore conclude that listing under the ESA is appropriate and necessary.

Comment 14: One commenter felt that with respect to longline commercial fishery interactions, the best available science and information does not support a conclusion other than commercial longline fisheries do not pose a threat to insular stock animals. The commenter asserts NMFS' conclusions and inferences are arbitrary, capricious, and inconsistent with the best available science.

Response: We disagree with both assertions in the commenter's statement. Commercial longline fisheries geographically overlap with a small portion of the range of the MHI insular population, thereby posing a risk. In addition, and as discussed in response to Comments 11, 12, 13, and 16, there are takes of MHI insular false killer whales in commercial longline fisheries, and they exceed PBR. As reflected in the 2011 SAR and in the draft 2012 SAR, the stock is considered to be strategic (Carretta *et al.,* 2012a; 2012b). Moreover, as discussed in the status review report, reduced total prey biomass and reduced prey size also pose a risk to the insular population. Although declines in prey biomass were more dramatic in the past when the insular population may have been higher, the total prey abundance remains very low compared to the 1950s and 1960s as evidenced by CPUE data from Hawaii longline fisheries and biomass estimates from tuna stock assessments (Oleson *et al.,* 2010). Long-term declines in prey size from the removal of large fish have been recorded from the earliest records to the future (Oleson *et al.,* 2010). As such, it is not appropriate to conclude that commercial longline fisheries pose no threat to this population.

Comment 15: One commenter quoted the proposed rule, which states that ''the longline prohibited area has also been effective by reducing interactions with the insular DPS since 1992, yet

interactions have still been documented and the total population size of the insular DPS has declined since then.'' The commenter indicated that the statement was untrue because there had been no documented interactions since 1992, and that the statement implies that longline fisheries are somehow responsible for the supposed decline. The commenter felt that despite zero documented interactions, NMFS concludes that not only do longline fisheries interact with the insular population, but that they do so to a degree that has caused, and still causes, a decline in the population.

Response: As discussed in the status review report, the intense and increased fishing activity within the known range of MHI insular false killer whales since the 1970s suggests a significant risk of fisheries interactions, even though the extent of interactions with almost all of the fisheries is unquantified or unknown. The only fishery for which there are recent quantitative estimates of hooking and entanglement of false killer whales is the commercial longline fishery. We note that the pelagic stock of false killer whales has been documented to interact with observed longline fisheries at a rate well above its PBR. Although the longline fishery has been largely excluded from the known range of MHI insular false killer whales since the early 1990s, there remains a risk of interaction in the overlap zone (see Response to Comment 14). The deep-set longline fishery does interact with MHI insular false killer whales in the overlap zone, and these interactions have been prorated to MHI insular and pelagic stocks (see Response to Comment 11). Furthermore, evidence of dorsal fin scarring and disfigurements indicates that the MHI insular false killer whales remain at risk from fisheries. These injuries cannot be definitively attributed to one specific fishery, but the possibility that the injuries are from the longline fishery cannot be discounted. Given this information, we do not agree that no interactions have occurred since 1992. We also believe that because of this information, fishery interactions, including those in longline fisheries, have played a role in the decline of the MHI insular population.

Comment 16: One commenter cautioned that the role of prey reduction in the insular population's decline and potential recovery may have been underestimated. It was recommended to further investigate fishery-related reductions of the target fish stocks and the manner in which those reductions are realized on a spatial basis, and how those reductions coincide with or may affect the foraging of insular false killer whales.

Response: We agree with this recommendation and will look at ways to further investigate prey reduction and possible effects to false killer whales.

Comment 17: One commenter submitted a number of comments relating to prey competition. The commenter stated that NMFS asserts that competition for prey with fisheries is a threat, but fails to make a causal connection establishing that fisheries compete with the insular population for prey or that insular animals are nutritionally distressed or otherwise suffering from a supposed lack of prey. The commenter asserted that the best available information shows that prey competition, if any, between commercial longline fisheries and insulars poses no risk to insulars. The commenter stated that commercial longline fisheries fish almost exclusively outside the insulars' range and entirely outside of areas in which insulars have been satellite tracked; the proposed rule suggests competition for bigeye tuna is a threat to insulars yet no animal has been observed feeding on bigeye and this is consistent with data showing that bigeye are not abundant in nearshore areas inhabited by insulars; the status review report states that ''stock assessments clearly outline a similar pattern of substantially declining biomass in the 1960s to 1970s'' for bigeye and yellowfin tuna, however, this statement refers to the Western and Central Pacific tuna stocks generally and says nothing about abundance and presence of those species in the nearshore insular waters. In sum, the commenter felt that the link between prey reduction allegedly caused by longline fisheries and the insular population is not based on any scientific data or information and to suggest this as a medium risk is directly contrary to the best available science. Finally, the commenter felt that comments on prey competition submitted by the Western Pacific Regional Fishery Management Council (Council) in response to the 90-day finding do not appear to have been considered in the status review report or proposed rule.

Response: As discussed in greater detail in the status review report, it is clear based on observations of fish predation by insular false killer whales that fisheries and false killer whales do target many of the same fish species. Insular false killer whales have been observed feeding on yellowfin, albacore and skipjack tuna, scrawled file fish, broadbill swordfish, mahimahi, wahoo, lustrous pomfret, and threadfin jack (Baird, 2009). Many of these fish species are highly mobile, such that large-scale fisheries impact their populations, even if no commercial longlining is occurring within the majority of the MHI insular false killer whale population's range.

Although evidence of nutritional stress is difficult to obtain, the BRT notes that prey abundance and size have been dramatically reduced over the past five decades (Oleson *et al.,* 2010). It is also important to note that the level of fish removal by fisheries reduces the biomass of fish to a point that insular false killer whales may need to search over a greater area or for a longer period of time to find enough food, thereby expending more energy to find enough prey to meet their daily dietary needs. These dietary needs have been described in greater detail in the status review report, but to summarize, this was calculated for MHI insulars and, though it depends on the whale population age structure used, approximately 2.9 to 3.9 million pounds of fish would be consumed annually by MHI insular false killer whales. For comparison, this quantity of fish is similar to the current annual retained catch in the commercial troll fishery, which targets species such as marlin, mahimahi, wahoo, and yellowfin and skipjack tuna, and three to four times greater than the annual catch in the Main Hawaiian Islands handline fishery, which targets yellowfin tuna (Oleson *et al.,* 2010).

As for the prey reduction ''allegedly'' caused by longline fisheries, the role of longline fishing in reducing yellowfin and bigeye tuna population biomass throughout the range of the populations is well documented. The substantial reduction in the population biomass of these tuna, and other prey of the MHI insular population, poses a medium risk. The lack of precision in estimates is acknowledged by the BRT and we concur. Current exclusion of the longline fishery from the majority of the MHI insular population's range does not mean that localized reductions by the longline fishery, continued fishing of highly mobile pelagic prey by commercial fisheries, or continued local reductions by nearshore fisheries would not be impacting MHI insular false killer whales.

Zimmerman (1983) reports the loss of bigeye tuna from nearshore troll and longline fisherman by a false killer whale. Although there are no photographic or genetic records from the animal with which to determine whether it is from the MHI insular or pelagic population, the report of this loss of fish occurred in Hawaiian nearshore waters, suggesting a MHI

insular animal. That a false killer whale depredated bigeye from longlines indicates that bigeye is part of the diet, and therefore longline catch would be in competition with the whale for this resource. The relative proportion of MHI insular false killer whale diet that is composed of bigeye tuna is unknown.

As for the status review report, the reference to the stock assessments' ''similar pattern'' is in relation to the documented similarity of the decline in the CPUE data for local Hawaiian fisheries since the 1950s. The simplest explanation of long-term yellowfin and bigeye tuna CPUE declines, both local and stock-wide, is declining biomass. Other possible partial explanations for declining CPUE have been evaluated in the stock-wide assessments, which conclude that the CPUE trends do reflect substantial biomass declines. The cited assessments include Hawaii in their geographic extent, and the Hawaii longline CPUE data in their analysis. For highly mobile tuna populations, changes in the stock-wide biomass are reflected in local biomass. There are no separate tuna populations in insular Hawaiian waters.

Finally, the comments received in response to the 90-day finding from the Council were considered but were found to be inaccurate, as they did not account for a complete assessment of historical fisheries information. The Council did, however, reiterate these concerns in their comments on the proposed rule, and those comments are addressed individually throughout this document.

Comment 18: The State of Hawaii noted that the kaka line and shortline fisheries are assessed as high risk, although the characterization of both are further qualified and ranked as a ''distant third and fourth.'' The State also hoped that in the formulation of requirements, that these fisheries not be lumped with the troll fishery, which has significantly more potential for interaction based on numbers of fishers and the frequency of fishing. Finally, the State of Hawaii noted that the shortline fishery is listed as a Category II fishery in NOAA's 2011 List of Fisheries (LOF), and the kaka line is categorized as a Category III fishery. The State was concerned that the proposed listing does not rely upon this fishery listing assessment to determine the level of risk that has been characterized for the stock.

Response: The above quote was misinterpreted by the commenter. The sentence refers to the amount of effort in the fisheries and not risk from the fisheries. More specifically, the quote refers to how the troll fishery has by far the greatest participation and effort in fishing days of any fishery within the known range of MHI insular false killer whales, followed by the handline fishery, with the kaka line and shortline fisheries having the third and fourth greatest amount of effort. Collectively, they all are rated as a high overall threat level.

With respect to the formulation of fishing requirements, any potential future requirements would be addressed through separate MMPA, or ESA processes.

Finally, as for relying on the NMFS 2011 LOF listing assessment to determine the level of risk that has been characterized for the Category II shortline fishery (''occasional'' incidental mortality and serious injury), and the Category III kaka line fishery (''remote'' incidental mortality and serious injury), the BRT did consider the category listing of both. However, the BRT decided to collectively include all nearshore commercial and recreational fisheries, including troll, handline, shortline, and kaka line, under a single threat of interactions with these fisheries as it relates to the limiting factor of hooking, entanglement, or acts of prohibited take. This decision was based on the fact that some recreational fisheries in Hawaii target the same species as commercial fisheries (e.g., tuna, billfish) and use the same or similar gear, and might also be expected to experience interactions with false killer whales. However, it is possible that some of the stationary gears such as kaka line and short longline are a much greater risk to false killer whales than the troll fishery, as interaction is not necessarily a matter of magnitude of effort or hours on the water or number of hooks. The nature of the fishery operation puts it in different categories of likely interactions. We therefore concur with the approach used by the BRT.

The Range, Distribution, and Abundance of the Main Hawaiian Islands Insular False Killer Whale DPS

Comment 19: One commenter provided information that an additional 367 identifications (i.e., including re-sightings) of false killer whales from 19 different encounters around the Main Hawaiian Islands are now available. All of these encounters were of individuals from the MHI insular population, and the high re-sighting rate and lack of matches to the pelagic population provides further support that this is a small, socially-isolated population. In addition, the commenter stated that new data from 2009 and 2010 satellite tags further demonstrate that this is an exclusively island-associated population. Further analysis of data will help provide an assessment of critical habitat. Another commenter provided sighting data from within Maui County waters and stated that gathering and sharing data about Hawaiian false killer whales is an increasing priority.

Response: We appreciate this new information and agree that collecting and sharing data is vital so that the status of the species can be reevaluated on a regular basis. The BRT has reviewed the satellite-tagging and photo-identification data, and we concur that the information supports the DPS determination.

Comment 20: One commenter provided a number of general comments on the historical abundance of insulars. Specifically, the commenter stated that there was a lack of critical evaluation of the historical abundance, particularly the 1989 aerial survey, resulting in an inflated estimate of abundance prior to 1989, thus resulting in almost all model projections leading to extinction. The commenter also felt that the results of the PVA models would be less pessimistic had the BRT provided more realistic estimates of historical abundance and had critically reviewed the aerial survey results from 1989 and 1993 to 1997.

Response: The BRT chose current false killer whale densities at Palmyra Atoll as a potential indicator of historical abundance because the oceanographic productivity there is thought to be similar to that found in the nearshore environment of the MHI. The trend in the PVA is derived using both the estimates of historical abundance, as well as the decline in encounter rates during the aerial surveys in the 1990s and early 2000s. A number of PVAs were run that considered lower historical abundance and greater uncertainty in historical abundance, with all models leading to relatively high extinction probabilities within 75 years, which is equivalent to 3 generations.

With respect to the 1989 survey, Sensitivity trial 3, detailed in Appendix 2 of the status review report, ignored the 1989 aerial survey estimate or any other derivation of historical abundance, specifying a large distribution for historical abundance. This trial indicated a 100 percent certainty of functional extinction within 75 years, higher than the probability estimated from the base model. This demonstrates a high probability of extinction even when this aerial survey data is not included in the analysis. Overall, however, the extinction risk conclusions are based upon the entirety of the

evidence, not the outcome of a single PVA trial or population estimate.

Comment 21: One commenter provided a number of comments pertaining to the inadequate justification for the use of Palmyra Atoll density, which was extrapolated out to the 202,000 km² area within 140 km of the MHI to ascertain a plausible historical abundance of insulars. Comments included that Palmyra Atoll was used solely on the basis that it is the highest reported density of the species; Palmyra Atoll is situated in more productive equatorial waters than the sub-tropical Hawaii, but no comparison of availability and abundance of prey species around Palmyra Atoll is made with those around Hawaii; the density of Palmyra Atoll is applied uniformly to the 202,000 km² areas within 140 km of the MHI, even though a core range within 40 km of the MHI is acknowledged, thus resulting in an extremely inflated estimated historical abundance; it is likely that Palmyra Atoll historically has had higher densities of false killer whales than in the MHI and thus Palmyra Atoll density is likely not the appropriate density to use in estimating historical abundance; if the insular population is so distinct then a comparison to other populations cannot be made; and finally, NMFS suggests the Palmyra Atoll estimate is conservative because known longlining occurs and false killer whales are known to become seriously injured or die as a result, and in reaching this erroneous conclusion, NMFS fails to disclose that there was only one observed serious injury from 2004 to 2008 and that the estimated mortality and serious injury rate is 0.3 which is far below the Palmyra population PBR of 6.4.

Response: In addition to the response provided in Comment 20 about why the BRT chose current false killer whale densities at Palmyra Atoll as a potential indicator of historical abundance, there is some information available on tuna abundance near Palmyra, which suggests similar species composition (mix of bigeye tuna and yellowfin tuna) as around Hawaii (Howell and Kobayashi, 2006). Additionally, while it is true that equatorial productivity can be quite high, the latitude of Palmyra places it marginally northward of that primary feature of equatorial productivity.

As for the density of Palmyra Atoll applied uniformly within the 140 km of the MHI, despite there being a core range within 40 km, the current boundary of the MHI insular false killer whale population is 140 km from the MHI. And while the existence of gradients or hotpots in overall density of MHI insular animals within that boundary have not been identified, it would be inappropriate to discount potentially large numbers of animals that could reside in the overlap zone between 40 and 140 km from shore.

As for genetic similarities or differences and its relevance to comparing populations, Palmyra Atoll whales are genetically distinct from Hawaii pelagic and MHI insular whales. However, there is no evidence that the genetic differences at Palmyra affect density. Since the data from Palmyra is otherwise the best available comparison for inferring historical density, we have used it in our assessment of extinction risk.

The BRT acknowledged that the historical abundance of MHI insular false killer whales is unknown. The MHI insular population density is among the highest in the tropical Pacific for this species, such that it is inappropriate to use the density from any other lower density region as a proxy for historical abundance. Although the EEZ surrounding Palmyra Atoll is more productive than the Hawaiian EEZ, higher productivity near the MHI could support similar densities of fish and false killer whales as a similar area in the Palmyra EEZ. Overall, information from the Palmyra Atoll stock provides a proxy for what the historical population density may have been within the MHI insular stock. Even if population density information from Palmyra is ignored, it is clear that the MHI insular stock has declined. Sensitivity trials 2 and 3 of the PVA assess the extinction risk for alternative plausible scenarios that do not rely on the density estimate from Palmyra Atoll.

As for PBR at Palmyra Atoll, the 2004 and 2005 false killer whale SARs indicate that historic interaction rates at Palmyra Atoll used to be as much as an order of magnitude higher than they are now. Therefore, the Palmyra Atoll density estimate was already impacted by fisheries and thus is lower than its pristine estimate, making the current density estimate in fact conservative. Moreover, serious injury and mortality rates at Palmyra Atoll were not the subject of the status review report; however, review of historical take information for Palmyra indicates that four false killer whales have been observed to be seriously injured or killed there since 2001 (one in 2001, two in 2002, and one in 2007 (Forney, 2010)).

Comment 22: One commenter provided a number of comments questioning the large groups of false killer whales observed in the 1989 aerial surveys. The commenter cautioned against the use of these results for the following reasons: inability to confirm the species of sighted animals due to lost photographic records; lack of genetic or other evidence to conclude that the documented large groups of false killer whales were associated with the insular population; and lack of replicated results supporting the existence of large groups of false killer whales in 1989. The commenter also noted that, while it is acknowledged that there could have been a short-term influx of pelagic animals, it is not acknowledged or considered that they could have been other species, such as melon-headed whales, and that without photographic evidence, the claim is anecdotal.

Response: Although photographic records are not available to confirm the species identification for the large groups observed in 1989, the experience of the two observers during that survey is unparalleled, with one of the two observers, Dr. Stephen Leatherwood, writing the guidebook on field identification of blackfish (false killer whales, melon-headed whales, pygmy killer whales, and pilot whales) (note that ''blackfish'' here is different from ''blackfish'' taken in the Hawaii-based longline fisheries, which refers only to false killer whales and short-finned pilot whales). The BRT discussed the species identification and felt there was little reason to question the judgment of the two observers during the aerial survey given their high level of expertise. We agree.

The BRT acknowledged the possibility that the large groups observed in 1989 might have represented an influx of animals from the pelagic population. This uncertainty is represented in the BRT plausibility scores for the parameterization of the PVA, as seen in the Appendix to the status review report. No other surveys for false killer whales were conducted in the 1980s until Mobley began flying aerial surveys in 1993. Observers noted three large groups during the 1989 survey on three different days, confirming that, at least within the short period of the 1989 survey, large groups of false killer whales did occur close to the MHI.

Comment 23: In addition to the comments above (in Comments 20 and 22) about the 1989 aerial survey, a number of other comments pertained to this topic. One commenter believed the point-estimate from 1989 to be unrealistic when considering the population estimate of 121 based on the 1993 to 1997 aerial surveys. The commenter asserted that the abundance

estimate of 121 appears to be simply ignored, and when it is considered, a dramatic decline of nearly 600 animals in the 4-year period from 1989 (based on the point-estimate of 769), suggests a large-scale mortality event in a very short time, for which no concrete evidence is provided. The commenter went on to state that, assuming that interaction rates have not changed over time, a simple extrapolation suggests that the estimated number of insular and pelagic false killer whales taken by longline fisheries in the U.S. EEZ around the MHI during the 4-year period from 1989 to 1993 would be no greater than 31.6 animals, which is substantially less than nearly 600 animals that supposedly disappeared. Therefore, other than questionable estimates of historical abundance, no other scientific evidence of a decline has been provided.

Response: We believe the 1993 to 1997 abundance estimate provided in Mobley (2000) is too low and presents a higher level of precision than is appropriate given the survey constraints. In other words, the Mobley (2000) abundance estimate of 121 individuals is thought to be negatively biased, meaning the abundance estimate is lower than actual abundance, because observers were not able to detect groups below the plane and no adjustment was made for this in the calculation of abundance from those surveys, as is suggested in Buckland *et al.* (2001) ''Introduction to Distance Sampling.'' The 1993 to 1997 estimates also carry high uncertainty due to the unsurveyed 400 m wide strip underneath the plane. The 1993 to 1997 aerial surveys may also be negatively biased due to the small average group size reported, suggesting that the aerial observers did not see the entire group. More recent analyses by Baird *et al.* (2008) have indicated that group size is positively related to encounter duration and that boat-based encounters of less than two hours duration generally yield an underestimate of total group size. When circling small groups in an airplane, sub-groups on the periphery of the circled group can easily be missed, especially when observers are focused on obtaining group size estimates from the group being circled. For these reasons, the BRT felt that the 1993 to 1997 estimate of 121 animals was unreliable and chose, instead, to use the encounter rate from each individual aerial survey in its assessment of population trend and extinction risk.

Finally, it is inappropriate to assume that take rates in the late 1980s and early 1990s should be the same as the current take rate. Longline fishing was allowed within the MHI insular population range until 1992. The emplacement of the longline exclusion zone eliminated the possibility of interactions over a very broad swath of the MHI insular population's range, likely significantly reducing bycatch of that population. Further, take rates of pelagic animals have exceeded the plausible reproductive rate (Oleson *et al.* (2010) calculated a rough inter-birth interval, or length between two live births, for false killer whales at 8.8 years) since bycatch monitoring began, suggesting the abundance of both populations has likely declined over time and therefore the rate of interactions may have also significantly declined relative to fishing effort. There is no data with which to evaluate historical levels of false killer whale take, or whether other causes of mortality such as a disease outbreak may have impacted the population in the late 1980s or early 1990s.

Comment 24: Two commenters stated that they understood that individuals associated with the 1989 surveys have suggested that the sightings in question involved melon-headed whales, not false killer whales, and therefore there is reasonable disagreement among those involved as to the species identification. In addition, with respect to Mobley's 2000 to 2004 surveys which had no false killer whale sightings compared to Baird's early 2000 surveys, which showed 160 insulars, there is no way to reconcile the difference. For example, perhaps the conditions or false killer whale spatial distribution at the time of the Mobley surveys in the early 2000s differed from those when his surveys were conducted in the 1990s.

Response: We have consulted with Dr. Randall Reeves, the one surviving scientist involved, who confirmed that the individuals identified in the comment were not directly or indirectly involved in the surveys, and confirmed that the animals sighted were more likely false killer whales than melon-headed whales.

As for the lack of reconciliation between Baird's abundance estimate for the 2000 to 2004 period and the absence of sightings by Mobley in the 2000 and 2003 surveys, the data are not incompatible. False killer whales occur in large social groups, which contribute to the sampling error of estimating relative abundance from aerial and boat surveys. Given the relatively low size of the population, this means that at any given time the population may only occur in a few groups. The numbers of groups detected on the five Mobley aerial surveys were 9, 8, 1, 0, and 0. Given that the expectation of the number of encounters is quite low on the aerial survey, it is foreseeable that some surveys would detect no groups when the relative abundance was low, even if alternative methods (photo-identification from small boats) had documented that abundance was greater than zero. In conclusion, the observation of zero groups from the aerial survey is not incompatible with a low population size, but is, in fact, to be expected.

Comment 25: A few commenters cited the draft 2010 SAR estimate abundance at 123 animals, while Baird *et al.* (2009) estimated abundance at 151, or 170 including Kauai. Taken together, these two estimates hardly suggest any decline over the last decade or associated risk of extinction. In fact, if the 1993 to1997 aerial survey estimate is considered, the insular population has remained stable for the last 18 years despite its small population size and threats.

Response: As discussed in the status review report, the estimate of 123 insular animals by Baird (2005) is considered an underestimate because of the type of mark-recapture model used, and due to limited information on animal movement. Recent reanalysis of photographic identifications back to 2000, not available for the draft 2010 SAR, but included in the status review report, suggest that the best estimate of 2000 to 2004 abundance is 162. This is best compared with the ''without Kauai'' estimate for 2006 to 2009, as the previous period did not include any individuals from Kauai. The animals around Kauai have now been linked to the newly recognized NWHI population, and not to the MHI population. As stated in the status review report (Oleson *et al.,* 2010), in Baird *et al.* (2012), and in the draft 2012 SAR (Carretta *et al.,* 2012b), the most recent and best estimate without Kauai is 151 animals, suggesting that the decline continues, even if at a lower rate than prior to 2000. The 2000 to 2004 and 2006 to 2009 estimates by Baird are thought to be overestimates of population size because they do not account for known missed matches of individuals within the photographic catalog. Some iterations of the PVA did include a change in the growth rate based on the possibility that the population may have stabilized in the most recent decade. However, even these models indicated functional extinction probabilities of 35 percent or greater for most models.

With respect to the 1993 to1997 aerial survey estimate, the BRT felt that this estimate is negatively biased and unreliable and therefore chose not to

use the estimate during its assessment of historical population size or trend. Encounter rates from the 1993 to 1997 aerial surveys are used instead of the abundance estimates, and these encounter rates decline from the first survey in 1993 to the last survey in 2002 (see Response to Comment 29).

Comment 26: One commenter noted that in November 2009, NMFS presented line-transect survey data which estimated the population size at 635, most of which was attributable to believed insular population sightings. However, NMFS now discounts this estimate due to the ''likely'' attraction of false killer whales to the survey vessel. The commenter contends that NMFS has not provided a public document that meaningfully describes or analyzes the 2009 survey data or the factors that resulted in the conclusions regarding ''likely'' vessel attraction.

Response: As stated in the status review report, and the notes from the 2009 Pacific Scientific Review Group meeting, the preliminary estimate of abundance from the 2009 survey is biased upward for two reasons: (1) The available data suggest significant vessel attraction, which has been shown for other species to result in overestimation of abundance by as much as 400 percent, and (2) because some of the sightings occurred in the insular-pelagic overlap zone and photographs or genetic samples are not available to assign these whales to a particular stock, the preliminary estimate includes animals from both populations. Vessel attraction can be inferred based on the observed behavior of the whales around the vessel (approaching the vessel from behind and remaining at close range next to the hydrophone array prior to moving ahead of the vessel and being detectable by the visual team) and the shape of the detection function from the line-transect analysis. This indicates significantly higher detection probabilities at very close range and at high sighting angles, supporting behavioral observations and indicating that this pattern is apparent on a broader scale than the single February 2009 survey. NMFS is analyzing the evidence for and potential magnitude of vessel attraction for false killer whales and expects to incorporate this information into stock assessments in the future.

Comment 27: With further respect to population size, one commenter argues that there are errors in the 1989 and Mobley data, stating that the conclusions of Reeves *et al.* (2009) and the inferences that NMFS draws from the paper are based on significant uncertainty and unsupported assumptions. Errors include: no data regarding false killer whale abundance or distribution prior to 1989 or during other months that year; no data linking the 1989 observations to sighting data in mid-1990s or in 2000 to 2004; no subsequent surveys or techniques employed to analyze the 1989 data; and no evidence that animals sighted in 1989 were from the insular population. The fact that these large groups were never sighted again supports a conclusion that they were not insulars.

Response: The commenter is correct that there is no information on abundance prior to 1989, since there is no individual photographic evidence linking the large group in 1989 to the insular population. However, as described above in the response to Comment 22, although a large group of 470 individuals has not been documented since 1989, it is incorrect to assume that none of these animals have been seen since, nor that this large group always remains together. Analysis of false killer whale social structure by Baird (2010) indicates that false killer whales occupy large social networks and may be seen with a variety of different individuals upon each encounter. The location of the 1989 sighting is well within the MHI insular population's 40 km core range, where no pelagic population animals have been observed, suggesting that the group was insular. However, the BRT acknowledged in its review of the data that this group could be from the pelagic population, and this was assessed as part of the plausibility analysis conducted to formulate the PVA. It is not clear how later surveys could be used to analyze the 1989 data.

Comment 28: One commenter proclaimed that NMFS is hesitant to conclude that animals observed near Kauai are members of the insular population. This same rationale is relevant to the 1989 sightings.

Response: The statement that we were hesitant to conclude that animals observed near Kauai were members of the insular population is true and the BRT acknowledged that the large groups seen in 1989 may be animals from the pelagic population, as might some of the Mobley sightings. These uncertainties were all taken into account when developing the PVA analyses and evaluating historical abundance and trend (see above). However, the combination of the photo-identification, movements (Baird *et al.*, in press), and genetics data since the 2010 status review now indicate that those individuals are part of a NWHI population (Oleson *et al.*, 2012) and not part of the MHI population. The range of this population overlaps partially with the MHI insular population, as satellite-tagged individuals from that population have been documented off the western side of Kauai and Niihau (Baird *et al.*, 2012). Three populations of false killer whales are now recognized within Hawaiian waters: the Hawaii pelagic population, the MHI insular population, and the new NWHI population (Carretta *et al.*, 2012). Of note now is that the base-case for the PVA analysis used recent mark-recapture abundance estimates including animals seen near Kauai, or 170 animals. Since those animals near Kauai have now been linked to the NWHI population, the best estimate for the MHI insular population is now 151.

As discussed further in the response to Comment 36, the 2010 status review did consider alternative PVA parameterizations, which assumed the lower abundance number of 151. Although those results were not heavily relied upon in the final evaluation by the BRT on extinction risk, some of the examples can be found in Appendix B of Oleson *et al.* (2010). The example runs using the lower abundance estimate of 151 do indicate slightly higher risk of extinction across the 50, 75, and 125-year time spans used in the PVA.

Comment 29: One commenter felt that NMFS' findings were inconsistent and are not explained. For example, ''historical population size of insulars is unknown'' therefore it is unknown whether the population has increased or decreased from historical levels because there is no historical abundance from which any increase or decrease can be inferred. In addition, the commenter points out that NMFS also recognizes that the limited available data merely ''suggests'' a decline, as opposed to shows or demonstrates. The commenter suggests it becomes clear in the proposed rule that NMFS works from the assumptions that a decline has in fact been established and the proposed rule is based on this assumption, which is inconsistent with Reeves *et al.* (2009). Finally, the multiple statements that the population has declined are inconsistent with Reeves *et al.* (2009), which never stated that a decline had in fact occurred. Rather the authors spoke of a ''possible'' decline that ''may have occurred.''

The commenter goes on to say that the proposed rule relies upon Mobley *et al.* (2000) and Mobley (2004) for the proposition that the insular population has experienced a decline in abundance because 5 data points over a 10-year period indicate a decline in sighting rates. However, no analysis from

Mobley was provided on the sighting rates. Moreover, it is scientifically tenuous to assume a decline based on different methods, times, personnel, and goals. The 2009 SAR states ''a recent study (Reeves *et al.*, 2009) summarized information on false killer whale sightings based on various survey methods and suggested insulars may have declined in the last two decades. However, because of differences in survey methods, no quantitative analysis of the sighting data and population trends has been made.'' NMFS' findings and conclusions in the proposed rule are thus inconsistent with express findings made by NMFS as recently as October 2009.

Response: Although absolute historical abundance is unknown, this does not mean that no information is available with which to assess trends in abundance. Information on plausible historical density based on the current density at Palmyra Atoll is available. Declining encounter rates from the 1993 to 2002 aerial surveys suggest a decline in the population, rather than weather or other factors related to the survey platform, as encounter rates of other species with similar sighting characteristics increased or remained stable over the same period. There are no significant changes in survey methodology, personnel, or season that would preclude analysis of the Mobley aerial survey data in this way.

Reeves *et al.* (2009) did not attempt to reconcile differences in survey platforms to derive quantitative estimates of population trend. However, this does not mean that the seemingly disparate datasets cannot be used in a quantitative way to assess trend. Although NMFS has discounted the actual abundance estimates derived by Mobley as unreliable, the encounter rate information is still usable and can be combined with boat-based survey data by careful evaluation of the construction of the PVA, as outlined in Appendix 2 of the status review report.

The fact that Mobley himself did not analyze sighting rates is irrelevant to whether or not the sighting rates have in fact declined. Further, as of the final 2010 SAR (Carretta *et al.*, 2011), it is true that no analysis of sighting rates or population trends had been conducted by NMFS. However, this analysis was conducted for the status review report, and the report's findings were incorporated into the final 2011 SAR and draft 2012 SAR (Carretta *et al.*, 2012a; 2012b). The status review report summarizes the more recent analysis by Baird (2009), and treats all of the aerial survey and mark-recapture data in a quantitative framework that appropriately accounts for differences in survey methodology between the 1989 aerial survey, the Mobley aerial surveys, and Baird's mark-recapture estimates.

Comment 30: Two commenters questioned the use of a small number of unsubstantiated eyewitness reports used to support the high risk rating of interactions with non-longline commercial fisheries. In addition, the frequency of interactions with non-longline commercial fisheries is unknown. The conclusion that such activities pose a high risk to insulars is speculative at best and irrelevant to NMFS' consideration of the best available science. Finally, one commenter felt that NMFS does not have adequate scientific or commercial evidence to assign a high risk to non-longline commercial fisheries.

Response: The BRT separately evaluated severity, geographic scope, and certainty surrounding each identified threat to insular false killer whales. With respect to non-longline commercial fisheries, such as shortline and kaka-line, these fisheries use similar gear, but with a mainline length of less than 1 nmi, and target similar species to longline gear. These fisheries are also allowed to fish in nearshore waters. Based on the similarity of these fisheries to longline fisheries, and considering that the longline fisheries have a high mortality rate on false killer whales, in conjunction with anecdotal reports of interactions with cetaceans off the north side of Maui (although the species and extent of interactions are unknown (74 FR 58879, November 2009)), it is likely that interactions of these fisheries with false killer whales occur. Therefore, the BRT determined, and we agree, that a high risk rating based on interactions with non-longline commercial fisheries is valid.

The BRT also found, and we agree, that although there is no observer or monitoring program with which to quantitatively evaluate the incidence of hooking, entanglement, or acts of prohibited take of false killer whales caused by nearshore commercial fisheries, the eyewitness reports available do indicate that interactions are occurring. Evidence of dorsal fin scarring is consistent with line injuries (see response to Comment 15). Any level of interaction would yield a high cost to the population given its small size, and could occur throughout the range of the insular population. The BRT acknowledged that while the level of certainty surrounding the rate of occurrence is low, they were confident that a known threat of high severity and geographic scope could have a large impact on the population.

NOAA observer reports have documented two instances when fishing crews have discharged diesel fuel into the water around fishing lines in order to discourage damage to catch by marine mammals. These actions constitute take under the MMPA as they are reasonably likely to alter the behavior of or harm protected species, including false killer whales. There are also written reports of fishermen shooting at whales (TEC, Inc., 2009), but we are unable to substantiate those allegations based on a review of agency data.

As for the overall risk assessment, this was based on three criteria: severity of the threat, geographic scope of the threat, and level of certainty. A high level of certainty is desired, but not required for overall assignment of a potential threat as high risk. The number of eyewitness reports of entanglement and hooking by nearshore fisheries has increased in recent years. This, in conjunction with dorsal fin scarring and reports of fishing crew taking action to deter marine mammals, leads us to conclude that hooking, entanglement, and acts of prohibited take by fishermen is a high threat.

Comment 31: One commenter felt that NMFS significantly grounds its proposed rule in biased conclusions. The biased conclusions are based on selective use of data and ultimately dependent upon the resolution of uncertainty in favor of assuming the worst possible circumstance for the insular stock. This approach is not scientifically or legally credible.

Response: We disagree that the proposed rule is based on biased conclusions and this is addressed in our responses to Comments 4, 24, 26, 28, and 29. Moreover, throughout the status review process the BRT evaluated the level of uncertainty in all data available to them and then judged the most plausible scenario. The summary of the votes on individual DPS, PVA, and threats questions may be used as evidence of this consideration and the Team's attempt to weigh the various options in the face of uncertainty and produce a report based on the most plausible outcome. In sum, the BRT's scientific opinion is based on the best available scientific information, which was the basis of the proposed rule and supports this final rule. Ultimately the best available data supports our conclusion that a decline in the MHI insular population has in fact occurred and is likely to continue.

Comment 32: One commenter submitted a number of comments on the PVA analysis. Comments included: estimates of extinction risk are premature; and further analyses are

needed due to positive biases in estimates. For example, (1) in calculating extinction risk, no consideration was given to the possibility that Reeves *et al.* (2009) minimum estimates include offshore animals. It is not included in the ''prior'' options. Sensitivity test 3 with a broader prior distribution for the 1989 abundance (50 to 3000) might appear to account for this, but the results for that test are heavily influenced by the Mobley survey sightings. A more appropriate sensitivity would use a much lower range of abundance. (2) The relative weights given to different realizations from the priors constructed depend on the likelihood evaluated for the abundance-related information. Here, a number of queries arise: (a) The formula at the top of page B–11 in the Appendix of the status review report is wrong. The CV should be squared and there is a multiplicative factor of 0.5 missing. It is unclear whether these are typos or incorrect calculations. (b) Information detailing how Baird *et al.* (2009) determined photo-identification mark-recapture estimates don't seem to be available, but the text suggests common factors for the estimates for the two different periods, in which case a likely positive covariance should be computed and incorporated in a modified formula. (c) While a change to a Poisson distribution for the likelihood component from the Mobley time series of sighting rate estimates is appropriate, no attempt seems to be made to take account of what might be substantial overdispersion in these distributions, leading to over-weighting of this info. (3) Put another way, point C above might be re-expressed as a concern about the compatibility of Baird's abundance estimate for the 2000 to 2004 period, and the absence of sightings by Mobley in the 2000 and 2003 surveys. (4) Questions arise about the CVs of Baird *et al.* (2009) estimates given that these are much less than the CV of 0.72 reported in Baird *et al.* (2005) for an estimate for the earlier period. (5) A particular concern is that a Bayesian approach can give an answer even if mutually inconsistent data are input, when that answer would be clearly wrong. Models and data inputs must be consistent, followed by consideration of relative plausibility. The commenter recommended that diagnostic checks be carried out on simpler model fits on the basis of maximum likelihood, in particular to check mutual compatibility or otherwise of the data used and the model and statistical distribution assumptions made. The BRT should also seek to include further reality checks on the fishing decline information.

Response: As detailed throughout our responses to these comments, we do not agree that there is concern about potential bias in the estimates of extinction risk or the other issues raised. The overall result is that several evaluations of extinction risk, given different combinations of input data, all suggest the population has declined (see Appendix 2 of the status review report (Oleson *et al.*, 2010)). The estimates of extinction risk are similar despite the choice of input parameters and excluding either of the aerial survey data sets.

It is not true that no consideration was given to examining the role of the 1989 minimum estimate from Reeves *et al.* (2009). As noted, Sensitivity test 3 examined the influence of the 1989 estimate by removing it from the analysis. The Reeves *et al.* (2009) minimum estimate in combination with the mark-recapture abundance estimates indicate the population has declined, as does the Mobley trend data. Therefore, two independent datasets both indicate that the population has declined, and the extinction probability results were examined in sensitivities that removed either set of information, with similar results. We do not understand what is meant by the commenter's statement that ''a more appropriate sensitivity would use a much lower range.'' In Sensitivity test 3, a lower bound on 1989 abundance of 50 was used. The posterior distribution for the 1989 abundance in that case did not support an abundance of less than 50 in 1989; therefore, using a lower bound would not have changed the results.

It is correct that the equation at the top of page B–11 of the status review report has two typos. The squared term should be outside the brace (equivalent to squaring the CV) and there should be a 0.5 in front. The equation is correct in the program code used to run the analyses.

As for a likely positive covariance that should be incorporated, identical methods (POPAN open model with constant or time-varying models for capture probability and survival) were used to calculate the two abundance estimates, but no common data or parameters were shared between the two estimates. Each estimate was based on a separate estimate made from two different data sets: 2000 to 2004 and 2006 to 2009. Therefore, there is no covariance that needs to be accounted for. In both cases, the first and second best model as selected by AICc (a measure of model fit that balances the deviation between the model and input data and the number of parameters required to define the model) were the same for each data set, indicating the datasets were compatible.

With respect to the comment on substantial over-dispersion in the distributions, we see no evidence for over-dispersion in the five Mobley estimates. There is relatively little variance between estimates from nearby years. Moreover, if the Mobley data had undue influence from over-weighting of that information, evidence for that would be if the estimated trajectory was dragged away from the other data. Instead, the estimated median trajectory in every case goes right through the mark-recapture estimates, so the Mobley data are not exerting undue influence and pulling the results away from the other data. Additionally, a sensitivity test was run removing the Mobley data, and the results were still quite similar, showing that the Mobley data are not solely driving the results.

As for the concern about the compatibility of Baird's abundance estimate for the 2000 to 2004 period and the absence of sightings by Mobley in the 2000 and 2003 surveys, we address this issue in our response to Comment 24. As for CVs of Baird *et al.* (2009) compared to the CV of 0.72 reported in Baird *et al.* (2005) and why there was such a notable difference, the original Baird estimate (2005) averaged outputs from closed population models with limited information about animal movement throughout the study area and based on a smaller photographic catalog, yielding higher CVs on those estimates. The later estimates used an AIC to evaluate model fit and choose the best open-population model accounting for heterogeneity in sighting rates, reducing the uncertainty surrounding new estimates.

Regarding the commenter's concern about using a Bayesian approach because it can give an answer even if mutually inconsistent data are input, nothing about the Bayesian approach makes it particularly susceptible to this type of issue. Maximum-likelihood estimation (MLE) methods can have the same issue. However, more importantly, it is not clear what mutually inconsistent data the commenter refers to in this comment. The only data the model are fit to are the mark-recapture abundance estimates and the Mobley trend data. In combination with the prior distribution for the 1989 abundance from Reeves *et al.* (2009), both sets of data support a decline in the population, and are therefore consistent with one another. Moreover, sensitivities were run excluding either data set, and with a very broad prior

distribution for the 1989 abundance, with similar results regarding the probability of extinction, so this issue has been thoroughly examined. A Bayesian approach was preferred given that the 1989 abundance from Reeves *et al.* (2009) was treated as a minimum count, so this could be easily incorporated into a prior distribution. If MLE methods were to be used, the 1989 minimum count could only be implemented by penalizing trajectories that went below that number, which would not be as straightforward an approach as the Bayesian approach.

Concerning running diagnostic checks on simpler model fits, as already expressed, the data are not mutually incompatible. Both sets of data support a decline in the population, and results regarding probability of extinction are similar if either data set is removed from the analysis. The model may appear to be complex due to the stochastic elements that are specified, but the one-rate model has only two estimated parameters, essentially the slope and intercept of an exponential model. Therefore, the model fitting itself is not complicated, and the fits to the data are relatively straightforward, so there is no need for further diagnostic checks.

Public Comments From the Second Public Comment Period

As previously indicated, we reopened the public comment period on September 18, 2012, for the limited purpose of soliciting comments on new scientific research papers and the recent NWHI false killer whale population (77 FR 57554). Comments were received from 15 commenters. Substantive comments were again received from two research, conservation, and education groups; the Humane Society; the Marine Mammal Commission; the State of Hawaii; the Western Pacific Regional Fishery Management Council; and the Hawaii Longline Association. These substantive comments are addressed below.

Comment 33: A number of commenters stated that the new information adds additional support to the MHI insular population's genetic discreteness and significance and that despite some overlap in range between the MHI and NWHI populations, photo-identification, genetic analysis, and tagging studies all indicate that the NWHI is a distinctly separate population from the MHI insular population.

Response: We agree that based on the best available data, the MHI insular population of false killer whales is a separate population from false killer whales found in the NWHI. We also agree that the information described by the commenters supports the conclusion that MHI insulars continue to meet the discreteness and significance criteria to be considered a DPS under the ESA. See Responses to Comments 35–37.

Comment 34: One commenter questioned whether the 1989 survey data misidentified 400 animals off of the Big Island, and wondered what happened to over 300 animals in the last 20 years if there are only 150 animals left. The commenter also stated that since the NWHI stock mingles and overlaps with the MHI stock, then it would seem logical to group these two populations together instead of treating them as separate groups.

Response: We assume the commenter refers to the 3 large groups (group sizes 470, 460, and 380) of false killer whales reported close to shore off the island of Hawaii on 3 different days during the 1989 aerial survey sightings (Reeves *et al.*, 2009). We acknowledge that these observed group sizes are more than 3 times larger than the current best estimate of the size of the insular population; however, we do not believe this indicates that the animals were misidentified. As discussed in detail in the status review report (Oleson *et al.*, 2010) and the proposed rule, the large sizes of these groups raise the possibility that the animals seen during the 1989 surveys could represent a short-term influx of pelagic animals to waters closer to the islands. However, the BRT determined, and we agree, that these sightings likely consisted of insular animals because the sighting locations remain close to shore (approximately 4.5 to 11 km from shore (Reeves *et al.*, 2009)) and we lack evidence of pelagic animals occurring that close to the islands. Additionally, as acknowledged in our response to comment 22 this large group of false killer whales were identified by experts in ''black fish'' identification.

Comparison of the largest group sizes documented in the 1989 survey with recent population estimates suggest that the population has declined. Still, this is not the only evidence of decline; a regression of sighting rates from aerial surveys between 1993 and 2003 covering both windward and leeward sides of all of the MHI reveals a significant decline (Baird, 2009).

We are not able to attribute this decline to a particular source; however, the status review report discussed a number of historical factors that we believe have contributed to the decline of this population. These factors contributing to the decline include: reduced prey biomass and size; competition with fisheries; accumulation of natural and anthropogenic contaminants; live capture operations occurring prior to 1990; disease and predation because of exposure to environmental contaminants; inadequate regulatory mechanisms, such as a lack of an observer program for nearshore fisheries; interactions with commercial longline fisheries; and finally, reduced genetic diversity due to small population size (Oleson *et al.,* 2010).

As for the comment on grouping the MHI and NWHI populations together, the MHI insular population and NWHI populations do not interbreed, such that significant genetic evidence supports separation of the population for management purposes despite a small geographic overlap in range near Kauai. See our discussion of the reevaluation of the DPS above and our Response to Comment 37.

Comment 35: Two commenters stated that the new information continued to support the uniqueness of the ecological setting that MHI insulars occupy versus that of NWHI false killer whales. Of note is the large size and high elevations of the MHI which increases local productivity in many ways, while the small size and low elevations of the NWHI do not favor these factors. In addition, although the sample size for the NWHI population is low, the animals appear to use deeper waters further from shore than MHI animals, which is consistent with such ecological differences.

Response: We agree that the information noted by the comments indicates physical and ecological differences between the MHI and NWHI habitats, and that tracking data may also indicate differences between how these animals use their respective habitats. The Reevaluation of the DPS Determination section of this rule describes how this information was considered with regards to the discreteness and significance criteria.

Comment 36: A few comments identified that the new information confirms that the population estimate for the MHI insulars should be based on the lower abundance estimates (151) presented in the status review and the proposed rule, because the higher abundance estimate (170) included individuals from the NWHI population. Since the PVA analysis relied on the 170 estimate, those analyses likely underestimated the risk to the MHI insular population. In addition, one commenter believed that the effective population size is likely an overestimate, citing that the additional genetic analyses from Martien *et al.* (2011) estimates the effective population

size of only 50 individuals and that if the population has undergone a recent decline, as supported by observational data (Baird, 2009; Reeves *et al.*, 2009; Oleson *et al.*, 2010), the effective population estimate is actually likely to be an overestimate of the current effective population size.

Response: We agree that the population estimate should be based on the lower abundance estimate, which represents the best available information. The animals around Kauai have now been linked to the newly recognized NWHI population; therefore, the most recent and best estimate for the MHI insular false killer whale population is 151 (Carretta *et al.*, 2012b). However, we note that in the 2010 status review the BRT did consider alternative PVA parameterizations, which assumed the lower abundance number of 151. Examples can be found in Appendix B of Oleson *et al.* (2010). The example runs using the lower abundance estimate of 151 do indicate slightly higher risk of extinction across the 50, 75, and 125-year time spans used in the PVA, further supporting the conclusion that ESA listing is warranted. Accordingly, we are satisfied that the BRT's PVA model accurately accounts for the extinction risk to a population of 151 animals.

We also agree that the new information continues to support our previous conclusions in the status review report (Oleson *et al.*, 2010) and the proposed rule (75 FR 70169; November 17, 2011) that the effective population size may be overestimated.

Comment 37: Two commenters stated that the data supporting a DPS determination continues to be uncertain and inconclusive based on behavioral and ecological characteristics of the NWHI population, thus no longer supporting the discreteness and significance criteria. One commenter went on to say that NMFS must consider the draft policy (76 FR 76987; December 9, 2011) on the interpretation of the phrase ''significant portion of its range'' under the ESA, and determine whether the MHI insular component of the population would be considered ''significant.'' The commenter further stated that should NMFS determine that the new NWHI population is actually part of the MHI population and that if this combined population qualifies as a single DPS, then NMFS must reassess the threats and extinction risk.

Response: We disagree that the data pertaining to the DPS is inconclusive. As discussed in the Evaluation of DPS Determination section of this rule, the BRT has found, and we agree, that the MHI insular population of false killer whales continues to meet both discreteness and significance criteria to be considered a DPS under the ESA. There is strong support for discreteness based on genetic and behavioral factors and there is independent support for significance based on marked genetic characteristic differences. Ecological and cultural factors also support the significance finding. Additionally, all factors when considered together strengthened the significance finding.

The ESA defines ''species'' to include subspecies or a DPS of any vertebrate species which interbreeds when mature (16 U.S.C. 1532(16)). As discussed in response to Comment 34, genetic evidence supports the finding that the MHI insular population and NWHI populations do not interbreed and are therefore not a single DPS. Thus, there is no need to reassess the threats and extinction risk to the MHI insular population on that basis. Consistent with the draft SPOIR Policy, because we have found this population to be a DPS that is separate from the NWHI and pelagic populations, we did not evaluate whether the MHI insular false killer whale's range constitutes a significant portion of a larger taxonomic range.

Comment 38: One commenter argued that the best available information does not support NMFS' conclusion that the insular stock has declined in abundance, because the primary support for the decline is based on the 1989 sighting data, which is unreliable, uncertain and is undermined by Bradford *et al.* (2012). Specifically, the commenter pointed out that quotes from Bradford *et al.* (2012) cautioned about creating abundance estimates based on a sighting of a single large group, because this can result in overestimates. They also asserted that the 1989 sighting data has not received the same amount of scrutiny, or skepticism as other more recent population estimates. The comment went on to indicate that it was unscientific, reflective of bias and arbitrary of NMFS to discredit data that are current and reliable, while at the same time relying on historical data that are questionable for an ESA listing.

Response: We disagree that the 1989 sighting data is unreliable or uncertain for a number of reasons as discussed in response to Comments 20, 22, 23, 24, 27, 28, and 34. As cited in the 2010 status review report, we have relied on a number of credible, peer-reviewed scientific data to support the decrease in sighting rates and therefore the decline of the MHI insular population. The Bradford *et al.* (2012) report does not undermine our conclusion to retain the population estimate from 1989. As the draft of Bradford *et al.* (2012) asserts, it is tenuous to extrapolate information from a single sighting of a large group to the entirety of the stock range, thereby, further inflating the estimate. However, the BRT did not extrapolate the 1989 group size estimates over the entirety of the stock's range, but rather used the group size estimates from that survey as a measure of the entire stock abundance in 1989. Further, Bradford *et al.*'s (2012) qualifying statements about the accuracy of the NWHI abundance based on a line-transect survey is irrelevant in this context, because MHI insular abundance is estimated using dozens of sightings across several years of survey effort treated within a mark-recapture framework, resulting in low uncertainty around the abundance estimate.

Comment 39: One commenter questioned the 2009 NMFS line-transect survey data that was discarded, stating that NMFS estimated 635 false killer whales, most of which were attributable to the insular stock. NMFS has apparently discarded that data without any explanation other than a cursory justification that ''vessel attraction'' occurred. However, NMFS has not made public any info pertaining to the 2009 survey and has provided no report or other scientific explanation that presents the data along with reasoned analyses supporting the agency's conclusion.

Response: We addressed this question in the response to the first public comment period (see Comment 26).

Comment 40: A number of comments were submitted related to peer review. One commenter stated that the BRT's status review report says, '' * * * analyses conducted by individual team members were subjected to independent peer review prior to incorporation into the Review.'' However, NMFS has not presented the results of this peer review and it is not clear which analyses were peer reviewed, by whom, and in what detail. The historical decline and DPS determinations should undergo formal CIE review. The State of Hawaii cautioned the use of the new information, stating that all except one of these papers are not yet externally peer-reviewed and published and therefore the results and conclusions should be considered preliminary until full review. The State of Hawaii also stated it would like to be involved in the external peer review since a number of important decisions such as critical habitat, calculation of minimum population size, potential biological removal, and allotment of serious injury and mortality to different stocks will be based, in part, on the papers under consideration. Additionally, the State

requested to contribute membership to any ''teams'' that are formed to evaluate and plan for management of this species.

Response: All of the data and information presented in the 2010 status review was peer-reviewed prior to use by the BRT and the status review report was also reviewed by three anonymous external reviewers as required by the OMB Peer Review Bulletin. All of the information presented in the 2010 status review is appropriately referenced to the source material. In some cases, the PSRG (Pacific Scientific Research Group; a regional advisory group to NOAA Fisheries) served as peer-review when results had not been subject to journal review. All but one of the data sources or reports used in the Reevaluation of the DPS (Oleson *et al.*, 2012) have been peer reviewed, either during review by independent scientific journals (e.g., Baird *et al.* 2012; Baird *et al.,* in press), as part of the NMFS Science Center's publication process (e.g., Bradford *et al.*, 2012), or by the PSRG (e.g., Bradford *et al.*, 2012; Martien *et al.*, 2011; Chivers *et al.*, 2011). A field report by Baird (2012) was the only piece of information evaluated by the BRT in the recent review that was not externally peer reviewed. All of the information in all of these papers was reviewed by the BRT up to their peer-review standard and meets the criteria of best-available scientific information.

Lastly, NMFS will continue to coordinate with the State of Hawaii as we move forward with the management of the MHI insular false killer whale.

Comment 41: The State of Hawaii expressed concerns that the mtDNA analysis may not be appropriate and that the genetic analysis in general may be compromised by pseudo-replication. They claimed the effective population size estimates include an analysis of convergence that is not statistically appropriate based on their consultation with the author of the statistical program used for this analysis. The State requested that NMFS discuss these issues with their experts.

We followed up with the State of Hawaii and its experts in the Department of Land and Natural Resources (DLNR) to further clarify their comments. The subsequent follow-up comments pertained to the genetic analyses found in Martien *et al.* (2012) and Chivers *et al.* (2012) and are summarized as follows: (1) It appears that false killer whales likely are made up of several populations that are based more on social groupings than on geographical locations (2) Because the findings indicate that false killer whales stay in natal groups, multiple samples from the same groups would potentially be pseudoreplicates. (3) The NWHI samples were chosen because they had mtDNA haplotypes similar to MHI insular haplotypes, therefore it doesn't make sense to compare mtDNA as part of the analysis because NMFS has hand-picked similar DNA. (4) One-fifth of NWHI samples assigned ambiguously in STRUCTURE and sample size may be an issue in this analysis. DLNR suggests using Nm (effective population size * effective proportion of immigrants) comparisons because they can be done using the private alleles method if convergence cannot be reached in programs like LAMARC (Likelihood Analysis with Metropolis Algorithm using Random Coalescence). (5) Chivers *et al.* (2012) extends their 2010 paper to include NWHI samples. The 2010 paper indicates that samples were considered insular if collected from groups that had been photo-identified as part of the insular social network. Locations of these samples were near the MHI; the pelagics were further offshore. Were samples assigned as pelagic or insular based on mtDNA or location? (6) It is interesting that Mexico and Hawaii pelagic mtDNA had such small differentiation (the most common haplotype was shared between these locations). Pelagic and Mexico samples were also really similar for microsatellites, which raises some questions about what level of differentiation is meaningful in this species/populations, and DLNR suggests bootstrapping over microsatellite loci for F-st to look at variation. (7) The indication in the Bayesian analysis, STRUCTURE, seems to be that the MHI insular stock is really different from everything else, including the NWHI stock. It would be interesting to know if the K=3 plot with 2 main clusters in the insular population is broken down by social cluster 3 and clusters 1 and 2 as indicated by Martien *et al.'*s (2011) results. (8) The subsampling technique in Martien *et al.* (2012) for evaluating whether sample size was large enough is not really statistically sound. Evaluating the results in this manner make it seem as if there is less uncertainty than there really is.

Response: We respond to the issues raised as follows: (1) Evidence from photo-identification, satellite tagging, and genetics suggest that populations are geographically based. There is considerable photo-identification and satellite telemetry data showing that the MHI insular population exhibits strong site-fidelity to the near-shore waters of the MHI. Similarly, available photographic and telemetry data from the NWHI also indicates site-fidelity to the NWHI. Though the ranges of these two populations overlap around Kauai, and the MHI insular population overlaps with the pelagic population between 25 and 75 nmi offshore, the amount of time that animals spend in these areas of overlap appears to be minimal. Furthermore, there have never been any encounters that involved animals from more than one of these populations. Within the MHI insular population there are distinct social groups. MHI insular social groups have broadly overlapping ranges and have been documented associating with each other on numerous occasions. Relatedness analyses suggest that mating between MHI insular social groups is common. Thus, we believe these are social groups within a population, not independent populations. (2) Pseudoreplication refers to failing to properly replicate treatments in an experimental design and is therefore not relevant to the sampling issue raised here. It appears as though the commenter's concern is that samples taken from the same group may not be independent because they are likely to have come from related individuals, and is suggesting that the subsampling used by Chivers *et al.* (2007) should be used to address this concern. Chivers *et al.* (2007) did not limit their sample set out of concern regarding related individuals but rather to ensure that they did not include duplicate samples in their dataset. Their analysis was based exclusively on mtDNA data. Thus, they were not able to identify individuals that had been sampled multiple times. Chivers *et al.* (2011) and Martien *et al.* (2011) were able to use microsatellite data to eliminate duplicates from the dataset prior to analysis, so the subsampling conducted by Chivers *et al.* (2007) was not necessary. The fact that a dataset contains closely related individuals is only cause for concern if the presence of those individuals results in the dataset not being representative of the underlying population allele and haplotype frequencies. In the case of MHI insular false killer whales, approximately two-thirds of the population has been sampled, and the samples are well-distributed among the social clusters. Thus, there is no doubt that the sample is representative of the population allele and haplotype frequencies. Sampling in the NWHI is much more limited. There is currently no information available regarding social structure within this population, but it is entirely possible the NWHI

samples are representative of a single social cluster, but not the entire population. (3) The NWHI samples were not hand-picked because they had haplotypes similar to the MHI insular population. Nearly all of the samples were collected from groups for which we had satellite telemetry data, indicating that they were closely associated with the islands and atolls of the NWHI and for which photo-identification data indicated long-term fidelity to the NWHI. Thus, it was the combination of the telemetry, photo-identification and mtDNA data that suggested the animals represented an island-associated population. Nonetheless, it is true that the mtDNA provides less insight into the relationship between the MHI insular and NWHI populations than does the nuclear data. The statistically significant differentiation between the two populations in the mtDNA dataset is entirely due to the lack of haplotype 2 in the NWHI, which is not very compelling given that haplotype 2 is also absent from one of the social clusters from the MHI insular population. The BRT specifically noted that in discussing the new genetic results, there were two findings that influenced the BRT's consideration: the finding of a new haplotype in the NWHI that has not been found in the MHI despite very good sampling in the MHI and the separation indicated by the microsatellite data (nuclear) that strongly suggests little gene flow between the NWHI and MHI. The Fst for the mtDNA data was down-weighted in our consideration because one of the three social groupings in the MHI has only haplotype 1 and nearly all samples from the NWHI likely originated from a single social group in which all individuals except one had haplotype 1. Thus, based on frequency comparisons of mtDNA alone, evidence for the MHI and NWHI being discrete populations is not very strong. It was, therefore, adding the nuclear data that carried the most weight with respect to whether the NWHI was another social cluster or a discrete population. (4) We acknowledge the suggestion for further analysis of the data and we plan to attempt to estimate migration rate between populations, though we anticipate that convergence may be an issue due to sample size limitations in the NWHI and pelagic populations. (5) Samples were not designated as MHI insular based on mtDNA or location. They were identified as belonging to the insular population if they were collected from groups that had been photo-identified as part of the insular social network. (6) While such analysis may be of biological interest in the future (particularly if more samples are obtained from these strata), this analysis does not bear on the question of whether the MHI is discrete from these other strata and hence would not influence our evaluation of DPS status. (7) The two main clusters in the insular population from the K=3 plot do not correlate with social clusters. (8) The author of the computer program to estimate effective population size notes correctly in the additional comments from the State of Hawaii that the results of the subsampling would be ambiguous if the effective population estimates converged at a sample size close to the total number of samples. However, as he points out in his email with the State of Hawaii, the estimates of effective population size for the MHI insular population actually converge at a sample size of 50, which is just over half of the total sample size. This result indicates that further sampling of this population is unlikely to substantially change the estimate of effective population size, as Martien *et al.* (2012) state. The estimate is, nonetheless, uncertain, as reflected in the 95 percent confidence intervals Martien *et al.* (2012) report. Martien *et al.* (2012) estimated effective population size for the social clusters and for the Hawaiian Archipelago as a whole specifically for the purpose of examining the impact of violating the assumption of a single, closed population. The estimates of effective population size for the social clusters and entire Hawaiian Archipelago do not influence the interpretation of the estimate for the MHI insular population, which is the only estimate with which the BRT was concerned.

Comment 42: One commenter noted that should MHI insular false killer whales be listed under the ESA, Baird *et al.* (2012) provides a quantitative assessment of location data from satellite-tagged MHI insulars to inform the designation of critical habitat.

Response: We acknowledge that Baird *et al.* (2012) provides satellite tagging data and may provide information useful for decision-making concerning designation of critical habitat. Comments on critical habitat will be evaluated during subsequent rulemaking on critical habitat. Summary of Factors Affecting the Main Hawaiian Islands Insular False Killer Whale DPS.

Overall, there were 29 threats identified to have either a historical, current, or future impact to MHI insular false killer whales. Of these, 15 threats are believed to contribute most significantly to the current or future decline of MHI insular false killer whales. The two most significant threats pertained to small population size and hooking, entanglement, or acts of prohibited take by fishers. The following discussion briefly summarizes our findings regarding these 15 threats to the MHI insular false killer whale DPS.

The discussion below is organized by the ESA section 4(a)(1) factors (A–E), including the key limiting factors within each section 4(a)(1) factor, the corresponding risk ratings, and the threats associated with those key limiting factors and overall threat level. Key limiting factors are the physical/biological/chemical features presently experienced by the population that result in the greatest reductions in the population's ability to recover compared to the conditions experienced prior to the onset of these threats. These key limiting factors are the most significant natural and anthropogenic factors that are currently impeding the ability of the population to recover. Key limiting factors are those that, if improved, would have a marked favorable effect on the species' status. We have identified 10 key limiting factors. The threat level of 1, 2, or 3 ranks how each threat will contribute to the decline of the DPS over the next 60 years: A ranking of 1 means a threat is likely to only slightly impair the DPS in a limited portion of the species' range; a ranking of 2 will moderately degrade the DPS at some locations within the species' range; and a ranking of 3 means this threat is likely to eliminate or seriously degrade the MHI insular false killer whale population throughout its range. More details and supporting evidence can be found in the proposed rule (75 FR 70169; November 17, 2010) and the status review report (Oleson *et al.,* 2010).

A: The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range

The key limiting factor associated with this ESA section 4(a)(1) factor is reduced food quality and quantity. The BRT ranked this limiting factor as medium risk in that it encompasses an intermediate number of threats that are likely to contribute to the decline of the MHI insular false killer whale population or contains some individual threats identified as moderately likely to contribute to the decline of the population at many locations within its range. These threats are described below.

(1) Reduced total prey biomass. This is a threat level 2 for MHI insular false killer whales for historic, current, and

future impact. Although declines in prey biomass were more dramatic in the past when the MHI insular false killer whale population may have been higher, the total prey abundance remains very low compared to the 1950s and 1960s as evidenced by CPUE data from Hawaii longline fisheries and biomass estimates from tuna stock assessments (Oleson *et al.,* 2010).

(2) Reduced prey size. This is a threat level 2 for MHI insular false killer whales for historic, current, and future impact. Long-term declines in prey size from the removal of large fish have been recorded from the earliest records to the future, and are related to measures of reduced total prey abundance, which include prey size (Oleson *et al.,* 2010).

(3) Competition with commercial fisheries. For competition with commercial longline fisheries, this threat is rated as a threat level 3 for its historic impact, while competition with commercial troll, handline, shortline, and kaka line fisheries is rated as a threat level 2 for its historic impact. Both commercial fishing categories are rated as a threat level 2 for current and future impact to MHI insular false killer whales. False killer whale prey includes many of the same species targeted by Hawaii's commercial fisheries, especially the fisheries for tuna, billfish, wahoo, and mahimahi.

(4) Competition with recreational fisheries. Reduced food due to catch removals by recreational fisheries was assessed to have a threat level 1 for historic as well as current and future impact. However, the extrapolated Hawaii recreational fisheries catch totals are many times higher than the reported commercial catch totals for troll, handline, shortline, and kaka line fisheries (Oleson *et al.,* 2010). Reported commercial catches may be under-reported, and some may be included in the recreational estimates, but if the nominal recreational estimates from the Marine Recreational Fisheries Survey (WPRFMC, 2010) are representative, then the recreational sector would represent at least as much competition for fish as the reported commercial troll, handline, shortline and kaka line fisheries.

(5) Accumulation of natural or anthropogenic contaminants. Many toxic chemical compounds and heavy metals tend to degrade slowly in the environment; therefore they tend to biomagnify in marine ecosystems, especially in lipid-rich tissues of top-level predators (McFarland and Clarke, 1989). Exposure to persistent organic pollutants, heavy metals (e.g., mercury, cadmium, lead), chemicals of emerging concern (industrial chemicals, current-use pesticides, pharmaceuticals, and personal care products), plastics, and oil, is rated as a threat level 2 for its historic impact, but a threat level 1 for current and future impact due to recent industry regulations.

B: Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

This factor may have contributed to the historical decline of MHI insular false killer whales with the threat of live-capture operations occurring prior to 1990. However, there are no current and/or future impacts identified for this section 4(a)(1) factor and the associated key limiting factor of low population density. Interactions with fisheries are discussed under Factor D: The Inadequacy of Existing Regulatory Mechanisms (below).

C: Disease or Predation

The key limiting factors associated with this listing factor are disease, predation, and competition, which the BRT ranked as medium, low, and low, respectively, in terms of the overall risk that the limiting factors will contribute to the decline of the species over the next 60 years, which is roughly the lifespan of a false killer whale. The threats associated with the medium-ranked disease limiting factor are described below.

(6) Environmental contaminants. Disease plays a role in the success of any population, but small populations in particular can be extremely susceptible to disease, as this threat can have a disproportionate effect. Anthropogenic influences can potentially increase the risk of exposure to diseases by lowering animals' immune system defenses, which may have detrimental effects to the population as a whole and result in mortality and reduced reproductive potential. Disease-related impacts from environmental contaminants are rated as a threat level 2 for its historic, current, and future impact.

(7)(a) Short and long-term climate change. Climate change is counted as a single threat but it is divided into two separate parts: in this section as it relates to an increase in disease vectors, and in Factor E (see (7)(b)) as it relates to changes in sea level, ocean temperature, ocean pH, and expansion of low-productivity areas. While not evaluated historically, climate change poses a threat level 2 for current and future impact to MHI insular false killer whales due to the possible increase in disease vectors.

D: The Inadequacy of Existing Regulatory Mechanisms

The limiting factor identified by the BRT for this section 4(a)(1) factor is incidental take, which was rated as a medium risk to MHI insular false killer whales. The section discusses: the lack of reporting/observing of nearshore fisheries interactions; and the longline fishing prohibited area as a regulatory measure.

(8) Lack of reporting/observing of nearshore fisheries interactions. A high rate of fin disfigurements (Baird and Gorgone, 2005) and other observations (described in greater detail in the proposed rule) suggest interactions between fisheries and MHI insular false killer whales. While Baird and Gorgone (2005) suggest there may be other causes for the fin disfigurements, they conclude that the injuries are most consistent with hook and line interactions. The BRT did not attribute these injuries specifically to the longline fleet; the injuries could have come from other hook-and-line fisheries as well. Only federally-managed longline fisheries are currently observed, whereas state-managed nearshore troll, handline, shortline, and kaka line fisheries are not observed. The BRT rated the continued lack of observer data for state-managed nearshore fisheries, and a lack of an independent reporting system for documenting interactions with MHI insular false killer whales, as a threat level 3 for historic impact but a threat level 2 for current and future impact to MHI insular false killer whales.

(9) Longline fishing prohibited area. We considered whether any other regulatory mechanisms directly or indirectly address what are deemed as the most significant limiting factors to the MHI insular DPS: small population size; and hooking, entanglement, or acts of prohibited take by fishermen. Small population size is considered an overall high risk because of reduced genetic diversity, inbreeding depression, and other Allee effects, but these are inherent biological characteristics of the current population that cannot be altered by existing regulatory mechanisms.

Regarding the significant limiting factor of hooking, entanglement, and acts of prohibited take, a regulatory mechanism exists to partially address interactions with commercial longline fisheries. The longline prohibited area around the Main Hawaiian Islands was implemented in 1992 through Amendment 5 to the Western Pacific Pelagic Fisheries Management Plan to alleviate gear conflicts between longline

fishermen versus handline and troll fishermen, charter boat operators, and recreational fishermen. Longline fishing has thus been effectively excluded from the MHI insular DPS's entire core range (less than 40 km from the shore) and a portion of the MHI insular DPS's extended range (within the insular-pelagic overlap zone) for two decades. This longline fishing prohibited area thus indirectly benefits MHI insular false killer whales by decreasing the amount of longline fishing in MHI insular false killer whale habitat. However, the decline of the MHI insular DPS continues despite the prohibited area.

The FKWTRP proposed rule, when implemented, would modify the existing longline exclusion zone to prohibit longline fishing year-round in the portion of the exclusion zone (and the insular-pelagic overlap zone) that was previously closed only seasonally. By providing for additional separation between the MHI insular whale's range and the longline fisheries, this action is expected to reduce the risk of incidental serious injury and mortality to the MHI insular false killer whale.

We note, however, that since the proposed FKWTRP has not yet been implemented, its effectiveness has not yet been demonstrated, and there is insufficient evidence to believe that this increase in the size of the existing prohibited area will reverse or slow the decline of the DPS. Under the FKWTRP, 26 percent of the insular-pelagic overlap zone will remain open to longline fisheries. Further, the longline fishing prohibited area does not apply to other commercial fisheries, including troll, short line, and kaka line fisheries, that are believed to pose a threat to MHI insular false killer whales.

Moreover, the FKWTRP proposed rule does not address other threats to the population, including low population numbers, inbreeding depression, genetic isolation, contaminants, and disease. Accordingly, we cannot conclude that the FKWTRP proposed rule is adequate to address the risks from the existing threats identified above.

In light of the foregoing, hooking and entanglement in all commercial fisheries is considered a threat level 3 for current and future impact.

E: Other Natural or Manmade Factors Affecting Its Continued Existence

Several limiting factors were identified for this ESA section 4(a)(1) factor. The most important of these, as determined by the overall ranking, include hooking, entanglement, or acts of prohibited take by fishers, which was rated as a high risk; small population size, which was rated as a high risk; and ''other,'' which was rated as a medium risk. Threats related to these limiting factors are discussed below. We also discuss impacts of short and long-term climate change (see also Factor C above).

(10) Interactions with commercial longline fisheries. The commercial longline fishery has been largely excluded from the core range of MHI insular false killer whales since the early 1990s, suggesting lower current and future impact from longlining (assuming the current restrictions remain in place). However, it is likely that unobserved interactions with the longline fishery represented a high impact through the early 1990s. Thus, interactions with the commercial longline fishery were rated as a threat level 3 for overall historic impact, but a threat level 1 for current and future impact.

(11) Interactions with commercial troll, handline, shortline, and kaka line fisheries. The BRT rated these commercial fisheries as a threat level 1 historically but a threat level 3 for current and future impact to MHI insular false killer whales. This level 3 or high current and future impact is assumed based on the scale and distribution of the troll and handline fisheries, and on anecdotal reports of interactions with cetaceans, although interactions specific to false killer whales are known only for the troll fishery.

(12) Reduced genetic diversity. This threat was rated as a threat level 2 for historic, current and future impact to MHI insular false killer whales. Reduced genetic diversity, coupled with the next two threats of inbreeding depression and other Allee effects, are associated with the limiting factor of small population size and were identified as threats that independently present a medium threat level, but which together contribute to a high overall current and future risk to MHI insular false killer whales. The effective population size (the number of individuals in a population who contribute offspring to the next generation) is about 50 breeding adults (Chivers *et al.,* 2010; Martien *et al.,* 2011). This number is so small that small population effects could have increasingly negative effects on population growth rate and other traits, including social factors (such as reduced efficiency in group foraging and potential loss of knowledge needed to deal with unusual environmental events), and may further compromise the ability of MHI insular false killer whales to recover to healthy levels.

(13) Inbreeding depression. This threat was rated as a threat level 1 historically, but a threat level 2 for current and future impact to the DPS.

(14) Other Allee effects. This threat was rated as a threat level 1 historically, but a threat level 2 for current and future impact to the DPS.

(15) Anthropogenic noise. Anthropogenic noise, caused from sonar and seismic exploration from military, oceanographic, and fishing sonar sources, among others, is rated as a threat level 1 historically, but a threat level 2 for current and future impact to MHI insular false killer whales. Intense anthropogenic sounds have the potential to interfere with the acoustic sensory system of false killer whales by causing permanent or temporary hearing loss, thereby masking the reception of navigation, foraging, or communication signals, or through disruption of reproductive, foraging, or social behavior.

(7)(b) Short and long-term climate change. While not evaluated historically, climate change as it relates to ''other natural or manmade factors'' poses a threat level 2 for current and future impact to MHI insular false killer whales and could be manifested in many ways, including changes in sea level, ocean temperature, ocean pH, and expansion of low-productivity areas (i.e., ''dead zones''). (See (7)(a) for how climate change relates to an increase in disease vectors under Factor C.)

Efforts Being Made To Protect the Main Hawaiian Islands Insular False Killer Whale DPS

Section 4(b)(1)(A) of the ESA requires consideration of efforts being made to protect a species that has been petitioned for listing. Accordingly, we assessed conservation measures being taken to protect the MHI insular false killer whale DPS to determine whether they ameliorate this species' extinction risk (50 CFR 424.11(f)). In judging the efficacy of conservation efforts identified in conservation agreements, conservation plans, management plans, or similar documents, that have yet to be implemented or to show effectiveness, the agency considers the following: The substantive, protective, and conservation elements of such efforts; the degree of certainty that such efforts will reliably be implemented; the degree of certainty that such efforts will be effective in furthering the conservation of the species; and the presence of monitoring provisions that track the effectiveness of recovery efforts, and that inform iterative refinements to management as information is accrued (Policy for

Evaluating Conservation Efforts (PECE); 68 FR 15100, 28 March 2003).

The conservation or protective efforts that met the aforementioned criteria and are currently in place include the following: (1) Take prohibitions under the MMPA; (2) authorization and control of incidental take under the MMPA; (3) protection under other statutory authorities (i.e., the Clean Water Act, MARPOL (Marine Pollution protocol for the International Convention for the Prevention of Pollution From Ships); (4) the longline prohibited area; (5) Watchable Wildlife Viewing Guidelines; and (6) active research programs.

The conservation or protective efforts that also met the aforementioned criteria but are not yet in place include the following: (7) The proposed rule implementing the False Killer Whale Take Reduction Plan that was published in the **Federal Register** on July 18, 2011 (76 FR 42082) (and detailed in the ''Relevant Background Information Pertaining to the Marine Mammal Protection Act'' portion of this final rule); and (8) the possible expansion of the Hawaiian Islands Humpback Whale National Marine Sanctuary. Each of these efforts is further described in the proposed rule for the listing (75 FR 70169; November 17, 2010).

We support all conservation efforts currently in effect and those that are planned for the near future, as mentioned above. However, these efforts lack the certainty of implementation and effectiveness so as to remove or reduce threats specifically to MHI insular false killer whales. Specifically, the MMPA, CWA, and MARPOL efforts are all certain regulatory measures, but they do not cover indirect or cumulative threats, such as non-point source pollution, nor do they, nor can they, address threats such as small population effects. The existing longline prohibited area around the Main Hawaiian Islands has also been effective by reducing interactions with the insular DPS since 1992, yet interactions with the longline fisheries have still been documented and the total population size of the MHI insular DPS has declined since then. The Watchable Wildlife Viewing Guidelines are only recommendations and thus are not legally enforceable. The active research programs have gathered valuable data, but many data gaps still remain and research is costly and could take decades.

As previously mentioned, NMFS published a proposed rule implementing the FKWTRP on July 18, 2011 (76 FR 42082). Once the measures in the FKWTRP are implemented, it will likely be beneficial to the MHI insular DPS. However, it will not address indirect or cumulative effects that are impacting the DPS, including threats from troll, kaka line, and short line fisheries not covered by the FKWTRP, and 26 percent of the insular-pelagic overlap zone will remain open to longline fisheries.

Finally, the possible expansion of the Hawaiian Islands Humpback Whale National Marine Sanctuary is not definite. It is not known whether false killer whales will be added as a species under protection, nor is it certain that it will be able to address indirect or cumulative threats. We also cannot say with a high level of certainty that the conservation efforts will be effective as required by the PECE policy (68 FR 15100, 28 March 2003). Therefore, we have determined that these efforts are not comprehensive in addressing the many other issues now confronting MHI insular false killer whales (e.g., small population effects) and thus will not alter the extinction risk of the species.

Final Listing Determination

Section 4(b)(1) of the ESA requires that the listing determination be based solely on the best scientific and commercial data available, after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any state or foreign nation to protect and conserve the species. We have reviewed the petition, the BRT's status review report (Oleson *et al.,* 2010), peer review, public comments, the BRT's reevaluation of the DPS (Oleson *et al.,* 2012) and other available published and unpublished information, and we have consulted with species experts and other individuals familiar with MHI insular false killer whales.

Based on this review, and in accordance with the BRT's findings, we conclude that the MHI insular false killer whale meets the discreteness and significance criteria for a DPS (61 FR 4722; February 7, 1996). The MHI insular false killer whale population is discrete due to marked separation from other populations of the same taxon as a consequence of genetic and behavioral factors. This population is significant to the species as a whole based on marked genetic characteristic differences. Additionally, ecological and cultural factors further support the significance of this population to the species as a whole, especially when these factors are considered together with the significance of the marked genetic differences. We also agree with the BRT's assessment of possible threats and their current and/or future risk to the MHI insular DPS. The greatest threats to the insular population are small population effects and hooking, entanglement, or acts of prohibited take by fishermen.

We agree with the BRT's assessment of extinction risk because most PVA models indicated a probability of greater-than-90 percent likelihood of the DPS declining to fewer than 20 individuals within 75 years, which would result in functional extinction beyond the point where recovery is possible.

Conservation efforts that have yet to be implemented or to show effectiveness, including those to protect the pelagic population of Hawaiian false killer whales as described in previous sections, may also benefit the MHI insular population. Taken together, however, we have determined that these efforts are not holistic or comprehensive in addressing the threats now confronting MHI insular false killer whales and thus will not alter the extinction risk of the species.

Based on the best scientific and commercial information available, including the status review report, we conclude that the MHI insular false killer whale DPS is presently in danger of extinction throughout all of its range. Factors supporting a conclusion that the DPS is in danger of extinction throughout all of its range include: (1) The present or threatened destruction, modification, or curtailment of its habitat or range (reduced total prey biomass; competition with commercial fisheries; competition with recreational fisheries; reduced prey size; and accumulation of natural or anthropogenic contaminants); (2) disease or predation (exposure to environmental contaminants or environmental changes; and increases in disease vectors as a result of short and long-term climate); (3) the inadequacy of existing regulatory mechanisms (the lack of reporting/observing of nearshore fisheries interactions; and the longline prohibited area not reversing the decline of the insular DPS); and (4) other natural or manmade factors affecting its continued existence (climate change; interactions with commercial longline fisheries; interactions with troll, handline, shortline, and kaka line fisheries; small population size (reduced genetic diversity, inbreeding depression, and other Allee effects); and anthropogenic noise (sonar and seismic exploration)).

Future declines in MHI insular population abundance may occur as a result of multiple threats, particularly those of small population size, and hooking, entanglement, or acts of prohibited take by fishermen. Current

trends and projections in abundance indicate that the MHI insular false killer whale DPS is in danger of extinction throughout all of its range. Given these threats, coupled with the small population size of less than 151 animals (Oleson *et al.,* 2010; Baird *et al.,* 2012; Carretta *et al.,* 2012b), and the current extinction projection of the population becoming functionally extinct within 3 generations or 75 years, we are listing the MHI insular false killer whale DPS as an endangered species, as of the effective date of this rule.

Prohibitions and Protective Measures

Because we are listing this species as endangered, all of the take prohibitions of section 9(a)(1) of the ESA (and codified in 16 U.S.C. 1538 (a)(1)(B)) will apply. These include prohibitions against the import, export, use in foreign commerce, or ''take'' of the species. ''Take'' is defined under the ESA as ''to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct'' (16 U.S.C. 1532(19)). These prohibitions apply to all persons subject to the jurisdiction of the U.S., including in the U.S. or on the high seas.

Section 7(a)(2) of the ESA and NMFS/U.S. Fish and Wildlife Service (FWS) regulations require Federal agencies to confer with us on actions likely to jeopardize the continued existence of species proposed for listing, or that result in the destruction or adverse modification of proposed critical habitat. Once a species is listed as threatened or endangered, section 7(a)(2) also requires Federal agencies to ensure that they do not fund, authorize, or carry out any actions that are likely to destroy or adversely modify that habitat. Our section 7 regulations require the responsible Federal agency to initiate formal consultation if a Federal action may affect a listed species or its critical habitat (50 CFR 402.14(a)). Examples of Federal actions that may affect the MHI insular false killer whale DPS include, but are not limited to: Alternative energy projects, discharge of pollution from point sources, non-point source pollution, contaminated waste and plastic disposal, dredging, pile-driving, water quality standards, vessel traffic, aquaculture facilities, military activities, and fisheries management practices.

Sections 10(a)(1)(A) and (B) of the ESA provide us with authority to grant exceptions to the ESA's section 9 ''take'' prohibitions. Section 10(a)(1)(A) scientific research and enhancement permits may be issued to entities (Federal and non-Federal) for scientific purposes or to enhance the propagation or survival of the species. The type of activities potentially requiring a section 10(a)(1)(A) research/enhancement permit include scientific research that targets the MHI insular false killer whale DPS.

ESA section 10(a)(1)(B) incidental take permits may be issued to non-Federal entities performing activities that may incidentally take listed species, as long as the taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.

Effective Date of the Final Listing Determination

We recognize that numerous parties may be affected by the listing of the MHI insular false killer whale DPS. To permit an orderly implementation of the consultation requirements applicable to endangered species, the final listing will take effect on December 28, 2012.

Critical Habitat

Critical habitat is defined in the ESA as: ''(i) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species'' (16 U.S.C. 1532(5)(A)).

Section 4(a)(3)(A) of the ESA requires that, to the maximum extent prudent and determinable, critical habitat be designated concurrently with the final listing of a species (16 U.S.C. 1533(a)(3)(A)). Designation of critical habitat must be based on the best scientific data available and must take into consideration the economic, national security, and other relevant impacts of specifying any particular area as critical habitat.

In determining what areas qualify as critical habitat, 50 CFR 424.12(b) requires that we consider those physical or biological features that are essential to the conservation of a given species and that may require special management considerations or protection. Pursuant to the regulations, such requirements include, but are not limited to the following: (1) Space for individual and population growth, and for normal behavior; (2) food, water, air, light, minerals, or other nutritional or physiological requirements; (3) cover or shelter; (4) sites for breeding, reproduction, rearing of offspring, germination, or seed dispersal; and generally (5) habitats that are protected from disturbance or are representative of the historical geographical and ecological distributions of a species. The regulations also state that the agency shall focus on the principal biological or physical essential features within the specific areas considered for designation. These essential features may include, but are not limited to: ''roost sites, nesting grounds, spawning sites, feeding sites, seasonal wetland or dryland, water quality or quantity, host species or plant pollinator, geological formation, vegetation type, tide, and specific soil types.''

In our proposal to list the MHI insular false killer whale DPS, we requested information on the quality and extent of habitats for the MHI insular false killer whale DPS as well as information on areas that may qualify as critical habitat. Specifically, we requested identification of specific areas that meet the definition above. We also solicited biological and economic information relevant to making a critical habitat designation for the MHI insular false killer whale DPS. We have reviewed comments provided and the best available scientific information. We conclude that critical habitat is not determinable at this time for the following reasons: (1) Sufficient information is not currently available to assess impacts of designation; (2) sufficient information is not currently available on the geographical area occupied by the species; and (3) sufficient information is not currently available regarding the physical and biological features essential to conservation.

Information Solicited

We request interested persons to submit relevant information related to the identification of critical habitat and essential physical or biological features for this species, as well as economic or other relevant impacts of designation of critical habitat, for the Main Hawaiian Islands insular false killer whale DPS. We solicit information from the public, other concerned governmental agencies, the scientific community, industry, or any other interested party (see **ADDRESSES**).

Classification

National Environmental Policy Act (NEPA)

ESA listing decisions are exempt from the requirements to prepare an environmental assessment or

environmental impact statement under the NEPA. See NOAA Administrative Order 216 6.03(e)(1) and the opinions in *Pacific Legal Foundation* v. *Andrus,* 657 F.2d 829 (6th Cir. 1981), and *Douglas County* v. *Babbitt,* 48 F.3d 1495 (9th Cir. 1995). Thus, we have determined that this final listing determination for the MHI insular false killer whale DPS is exempt from the requirements of the NEPA of 1969.

Executive Order (E.O.) 12866, Regulatory Flexibility Act, and Paperwork Reduction Act

As noted in the Conference Report on the 1982 amendments to the ESA, economic impacts cannot be considered when assessing the status of a species. Therefore, the economic analysis requirements of the Regulatory Flexibility Act are not applicable to the listing process. In addition, this rule is exempt from review under Executive Order (E.O.) 12866. This final rule does not contain a collection-of-information requirement for the purposes of the Paperwork Reduction Act.

E.O. 13132, Federalism

E.O. 13132 requires agencies to take into account any federal impacts of regulations under development. It includes specific directives for consultation in situations where a regulation will preempt state law or impose substantial direct compliance costs on state and local governments (unless required by statute). Neither of those circumstances is applicable to this final rule. In order to provide continuing and meaningful dialogue on issues of mutual state and Federal interest, the proposed rule was provided to the State of Hawaii, and the State was invited to comment. We have conferred with the State of Hawaii in the course of assessing the status of the MHI insular false killer DPS, and their comments and recommendations have been considered and incorporated into this final determination where applicable.

References

A list of references cited in this notice is available upon request (see **FOR FURTHER INFORMATION CONTACT**). Additional information, including agency reports, is also available via our Web site at *http://www.fpir.noaa.gov/PRD/prd_false_killer_whale.html.*

List of Subjects in 50 CFR Part 224

Endangered marine and anadromous species.

Dated: November 20, 2012.

Alan D. Risenhoover,

Director, Office of Sustainable Fisheries, performing the functions and duties of the Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 224 is amended as follows:

PART 224—ENDANGERED MARINE AND ANADROMOUS SPECIES

■ 1. The authority citation for part 224 continues to read as follows:

Authority: 16 U.S.C. 1531–1543 and 16 U.S.C. 1361 *et seq.*

§ 224.101 [Amended]

■ 2. Revise paragraph (b) by adding, ''False killer whale (*Pseudorca crassidens*), Main Hawaiian Islands Insular distinct population segment;'' in alphabetical order.

[FR Doc. 2012–28766 Filed 11–27–12; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 120813331–2562–01]

RIN 0648–XC164

Magnuson-Stevens Act Provisions; Fisheries of the Northeastern United States; Northeast Multispecies Fishery; Proposed Rule To Implement a Targeted Acadian Redfish Fishery for Sector Vessels; Reopening of Comment Period

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed rule; reopening of comment period.

SUMMARY: This action reopens the comment period for an Acadian redfish proposed rule that published on November 8, 2012. The original comment period closed on November 23, 2012; the comment period is being reopened to provide additional opportunity for public comment through December 31, 2012.

DATES: The comment period for the proposed rule published November 8, 2012 (77 FR 66947), is reopened. Written comments must be received on or before December 31, 2012.

ADDRESSES: You may submit comments, identified by NOAA–NMFS–2011–0264, by any one of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal eRulemaking Portal: *http://www.regulations.gov*.
- *Fax:* (978) 281–9135, Attn: Brett Alger.
- *Mail:* Paper, disk, or CD–ROM comments should be sent to John K. Bullard, Regional Administrator, National Marine Fisheries Service, 55 Great Republic Drive, Gloucester, MA 01930. Mark the outside of the envelope: ''Comments on Redfish Rule.''

Instructions: All comments received are part of the public record and will generally be posted to *http://www.regulations.gov* without change. No comments will be posted for public viewing until after the comment period has closed. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information. NMFS will accept anonymous comments (enter N/A in the required fields, if you wish to remain anonymous). You may submit attachments to electronic comments in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

Once submitted to NMFS, copies of addenda to fishing year (FY) 2012 sector operations plans detailing industry-funded monitoring plans, and the supplemental environmental assessment (EA), will be available from the NMFS NE Regional Office at the mailing address above.

FOR FURTHER INFORMATION CONTACT: Brett Alger, Fisheries Management Specialist, phone (978) 675–2153, fax (978) 281–9135.

SUPPLEMENTARY INFORMATION: A proposed rule published on November 8, 2012 (77 FR 66947) that would implement addenda to FY 2012 NE multispecies sector operations plans and contracts to add additional exemptions from Federal fishing regulations for FY 2012 sectors. Specifically, the action would expand on a previously approved sector exemption by allowing groundfish sector trawl vessels to target redfish using nets with codend mesh as small as 4.5 inches (11.4 cm). In addition, the action proposed to implement an industry-funded at-sea monitoring program for sector trips targeting redfish with trawl nets with mesh sizes that are less than the regulated mesh size requirement.

The proposed rule published in the **Federal Register** with a 15-day comment period that closed on November 23, 2012. Public comment from the fishing industry requested that the comment period be extended to allow the New England Fishery Management Council's (Council) Groundfish Oversight Committee and the full Council to discuss the proposal and to provide comment. The Groundfish Committee will be meeting December 19, 2012, and the Council will be meeting December 20, 2012. Both of these meetings plan to discuss the sector exemption request to target redfish using a codend mesh as small as 4.5 inches (11.4 cm). Reopening the comment period to overlap with the Council's meetings will provide additional time for the Council and other interested parties to provide comment on this action. Thus, NMFS is reopening the comment period on the proposed rule through December 31, 2012.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: November 23, 2012.

Alan D. Risenhoover,

Director, Office of Sustainable Fisheries, Performing the Functions and Duties of the Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

[FR Doc. 2012–28820 Filed 11–23–12; 4:15 pm]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 77, No. 229
Wednesday, November 28, 2012

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 25

[Docket No. FAA–2012–1246; Notice No. 25–12–16–SC]

Special Conditions: Embraer S.A., Model EMB–550 Airplane; Interaction of Systems and Structures

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed special conditions.

SUMMARY: This action proposes special conditions for the Embraer S.A. Model EMB–550 airplane. This airplane will have a novel or unusual design feature(s) associated with the interaction of systems and structures. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for this design feature. These proposed special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

DATES: Send your comments on or before January 14, 2013.

ADDRESSES: Send comments identified by docket number [FAA–2012–1246] using any of the following methods:

- *Federal eRegulations Portal:* Go to *http://www.regulations.gov/* and follow the online instructions for sending your comments electronically.
- *Mail:* Send comments to Docket Operations, M–30, U.S. Department of Transportation (DOT), 1200 New Jersey Avenue SE., Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* Take comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 8 a.m. and 5 p.m., Monday through Friday, except federal holidays.
- *Fax:* Fax comments to Docket Operations at 202–493–2251.

Privacy: The FAA will post all comments it receives, without change, to *http://www.regulations.gov/,* including any personal information the commenter provides. Using the search function of the docket Web site, anyone can find and read the electronic form of all comments received into any FAA docket, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, etc.). DOT's complete Privacy Act Statement can be found in the **Federal Register** published on April 11, 2000 (65 FR 19477–19478), as well as at *http://DocketsInfo.dot.gov/*.

Docket: Background documents or comments received may be read at *http://www.regulations.gov/* at any time. Follow the online instructions for accessing the docket or go to the Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except federal holidays.

FOR FURTHER INFORMATION CONTACT: Todd Martin, FAA, Airframe and Cabin Safety Branch, ANM–115, Transport Airplane Directorate, Aircraft Certification Service, 1601 Lind Avenue SW., Renton, Washington 98057–3356; telephone 425–227–1178; facsimile 425–227–1232.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite interested people to take part in this rulemaking by sending written comments, data, or views. The most helpful comments reference a specific portion of the special conditions, explain the reason for any recommended change, and include supporting data.

We will consider all comments we receive on or before the closing date for comments. We may change these special conditions based on the comments we receive.

Background

On May 14, 2009, Embraer S.A. applied for a type certificate for their new Model EMB–550 airplane. The Model EMB–550 airplane is the first of a new family of jet airplanes designed for corporate flight, fractional, charter, and private owner operations. The aircraft has a conventional configuration with low wing and T-tail empennage. The primary structure is metal with composite empennage and control surfaces. The Model EMB–550 airplane is designed for 8 passengers, with a maximum of 12 passengers. It is equipped with two Honeywell HTF7500–E medium bypass ratio turbofan engines mounted on aft fuselage pylons. Each engine produces approximately 6,540 pounds of thrust for normal takeoff. The primary flight controls consist of hydraulically powered fly-by-wire elevators, aileron and rudder, controlled by the pilot or copilot sidestick.

The Model Embraer EMB–550 airplane is equipped with systems that, directly or as a result of failure or malfunction, affect its structural performance. Current regulations do not take into account loads for the airplane due to the effects of systems on structural performance including normal operation and failure conditions with strength levels related to probability of occurrence. Special conditions are needed to account for these features.

Type Certification Basis

Under the provisions of Title 14, Code of Federal Regulations (14 CFR) 21.17, Embraer S.A. must show that the Model EMB–550 airplane meets the applicable provisions of part 25, as amended by Amendments 25–1 through 25–127 thereto.

If the Administrator finds that the applicable airworthiness regulations (i.e., 14 CFR part 25) do not contain adequate or appropriate safety standards for the Model EMB–550 airplane because of a novel or unusual design feature, special conditions are prescribed under the provisions of § 21.16.

Special conditions are initially applicable to the model for which they are issued. Should the type certificate for that model be amended later to include any other model that incorporates the same or similar novel or unusual design feature, the special conditions would also apply to the other model under § 21.101.

In addition to the applicable airworthiness regulations and special conditions, the Embraer S.A. Model EMB–550 airplane must comply with the fuel vent and exhaust emission requirements of 14 CFR part 34 and the

noise certification requirements of 14 CFR part 36 and the FAA must issue a finding of regulatory adequacy under § 611 of Public Law 92–574, the ''Noise Control Act of 1972.''

The FAA issues special conditions, as defined in 14 CFR 11.19, in accordance with § 11.38, and they become part of the type-certification basis under § 21.17(a)(2).

Novel or Unusual Design Features

The Embraer S.A. Model EMB–550 airplane is equipped with systems that, directly or as a result of failure or malfunction, affect its structural performance. Current regulations do not take into account loads for the airplane due to the effects of systems on structural performance including normal operation and failure conditions with strength levels related to probability of occurrence. Special conditions are needed to account for these features.

These special conditions define criteria to be used in the assessment of the effects of these systems on structures. The general approach of accounting for the effect of system failures on structural performance would be extended to include any system in which partial or complete failure, alone or in combination with other system partial or complete failures, would affect structural performance.

Discussion

These airplanes are equipped with systems that, directly or as a result of failure or malfunction, affect its structural performance. Current regulations do not take into account loads for the aircraft due to the effects of systems on structural performance including normal operation and failure conditions with strength levels related to probability of occurrence. These special conditions define criteria to be used in the assessment of the effects of these systems on structures.

Special conditions have been applied on past airplane programs to require consideration of the effects of systems on structures. The regulatory authorities and industry developed standardized criteria in the Aviation Rulemaking Advisory Committee (ARAC) forum based on the criteria defined in Advisory Circular 25.672, *Active Flight Controls,* dated November 11, 1983. The ARAC recommendations have been incorporated in European Aviation Safety Agency (EASA) Certification Specifications (CS) 25.302 and CS 25 Appendix K. FAA rulemaking on this subject is not complete, thus the need for the special conditions.

The proposed special conditions are similar to those previously applied to other airplane models and to CS 25.302. The major differences between these proposed special conditions and the current CS 25.302 are as follows:

1. Both these special conditions and CS 25.302 specify the design load conditions to be considered. In paragraphs 2(a)(1) and 2(b)(2)(i) of these special conditions, the special conditions clarify that, in some cases, different load conditions are to be considered due to other special conditions or equivalent level of safety findings.

2. Paragraph 2(b)(2)(i) of these special conditions include the additional ground-handling conditions of §§ 25.493(d) and 25.503. These conditions are added in case the Embraer S.A. Model EMB–550 airplane has systems that affect braking and pivoting.

3. Both CS 25.302 and paragraph (2)(d) of these special conditions allow consideration of the probability of being in a dispatched configuration when assessing subsequent failures and potential ''continuation of flight'' loads. However, these special conditions also allow using probability when assessing failures that induce loads at the ''time of occurrence,'' whereas CS 25.302 does not.

Applicability

As discussed above, these special conditions are applicable to the Embraer S.A. Model EMB–550 airplane. Should Embraer S.A. apply at a later date for a change to the type certificate to include another model incorporating the same novel or unusual design feature, the special conditions would apply to that model as well.

Conclusion

This action affects only certain novel or unusual design features on one model of airplanes. It is not a rule of general applicability.

List of Subjects in 14 CFR Part 25

Aircraft, Aviation safety, Reporting and recordkeeping requirements.

The authority citation for these special conditions is as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701, 44702, 44704.

The Proposed Special Conditions

Accordingly, the Federal Aviation Administration (FAA) proposes the following special conditions as part of the type certification basis for Embraer S.A. Model EMB–550 airplanes to address the effects of systems on structures.

1. General Interaction of Systems and Structures

For airplanes equipped with systems that affect structural performance, either directly or as a result of a failure or malfunction, the influence of these systems and their failure conditions must be taken into account when showing compliance with the requirements of Title 14, Code of Federal Regulations (14 CFR) part 25 subparts C and D.

The following criteria must be used for showing compliance with these special conditions for airplanes equipped with flight control systems, autopilots, stability augmentation systems, load alleviation systems, fuel management systems, and other systems that either directly or as a result of failure or malfunction affect structural performance. If these special conditions are used for other systems, it may be necessary to adapt the criteria to the specific system.

(a) The criteria defined herein only address the direct structural consequences of the system responses and performances and cannot be considered in isolation but should be included in the overall safety evaluation of the airplane. These criteria may in some instances duplicate standards already established for this evaluation. These criteria are only applicable to structure in which failure could prevent continued safe flight and landing. Specific criteria that define acceptable limits on handling characteristics or stability requirements when operating in the system degraded or inoperative mode are not provided in these special conditions.

(b) The following definitions are applicable to these special conditions.

(1) Structural performance: Capability of the airplane to meet the structural requirements of 14 CFR part 25.

(2) Flight limitations: Limitations that can be applied to the airplane flight conditions following an in-flight occurrence and that are included in the flight manual (e.g., speed limitations and avoidance of severe weather conditions).

(3) Operational limitations: Limitations, including flight limitations, that can be applied to the airplane operating conditions before dispatch (e.g., fuel, payload, and Master Minimum Equipment List limitations).

(4) Probabilistic terms: The probabilistic terms (i.e., probable, improbable, and extremely improbable) used in these special conditions are the same as those used in § 25.1309.

(5) Failure condition: The term ''failure condition'' is the same as that

used in § 25.1309. However, these special conditions apply only to system failure conditions that affect the structural performance of the airplane (e.g., system failure conditions that induce loads, change the response of the airplane to inputs such as gusts or pilot actions, or lower flutter margins).

2. Effect on Systems and Structures

The following criteria are used in determining the influence of a system and its failure conditions on the airplane structure.

(a) System fully operative. With the system fully operative, the following apply:

(1) Limit loads must be derived in all normal operating configurations of the system from all the limit conditions specified in Subpart C (or defined by special condition or equivalent level of safety in lieu of those specified in Subpart C), taking into account any special behavior of such a system or associated functions or any effect on the structural performance of the airplane that may occur up to the limit loads. In particular, any significant nonlinearity (rate of displacement of control surface, thresholds or any other system nonlinearities) must be accounted for in a realistic or conservative way when deriving limit loads from limit conditions.

(2) The airplane must meet the strength requirements of part 25 (static strength, residual strength), using the specified factors to derive ultimate loads from the limit loads defined above. The effect of nonlinearities must be investigated beyond limit conditions to ensure the behavior of the system presents no anomaly compared to the behavior below limit conditions. However, conditions beyond limit conditions need not be considered when it can be shown that the airplane has design features that will not allow it to exceed those limit conditions.

(3) The airplane must meet the aeroelastic stability requirements of § 25.629.

(b) System in the failure condition. For any system failure condition not shown to be extremely improbable, the following apply:

(1) At the time of occurrence. Starting from 1-*g* level flight conditions, a realistic scenario, including pilot corrective actions, must be established to determine the loads occurring at the time of failure and immediately after failure.

(i) For static strength substantiation, these loads, multiplied by an appropriate factor of safety that is related to the probability of occurrence of the failure, are ultimate loads to be considered for design. The factor of safety (FS) is defined in Figure 1.

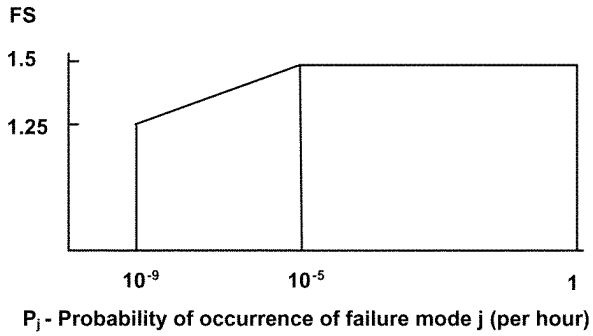

Figure 1: Factor of safety at the time of occurrence

(ii) For residual strength substantiation, the airplane must be able to withstand two-thirds of the ultimate loads defined in paragraph 2(b)(1)(i) of these special conditions. For pressurized cabins, these loads must be combined with the normal operating differential pressure.

(iii) Freedom from aeroelastic instability must be shown up to the speeds defined in § 25.629(b)(2). For failure conditions that result in speeds beyond V_C/M_C, freedom from aeroelastic instability must be shown to increased speeds, so that the margins intended by § 25.629(b)(2) are maintained.

(iv) Failures of the system that result in forced structural vibrations (e.g., oscillatory failures) must not produce loads that could result in detrimental deformation of primary structure.

(2) For the continuation of the flight. For the airplane, in the system failed state and considering any appropriate reconfiguration and flight limitations, the following apply:

(i) The loads derived from the following conditions (or conditions defined by special conditions or equivalent level of safety in lieu of the following special conditions) at speeds up to V_C/M_C, or the speed limitation prescribed for the remainder of the flight, must be determined:

(A) The limit symmetrical maneuvering conditions specified in §§ 25.331 and 25.345.

(B) The limit gust and turbulence conditions specified in §§ 25.341 and 25.345.

(C) The limit rolling conditions specified in § 25.349 and the limit unsymmetrical conditions specified in §§ 25.367, 25.427(b), and 25.427(c).

(D) The limit yaw maneuvering conditions specified in § 25.351.

(E) The limit ground loading conditions specified in §§ 25.473, 25.491, 25.493(d) and 25.503.

(ii) For static strength substantiation, each part of the structure must be able to withstand the loads in paragraph 2(b)(2)(i) of these special conditions multiplied by a factor of safety depending on the probability of being in this failure state. The factor of safety (FS) is defined in Figure 2.

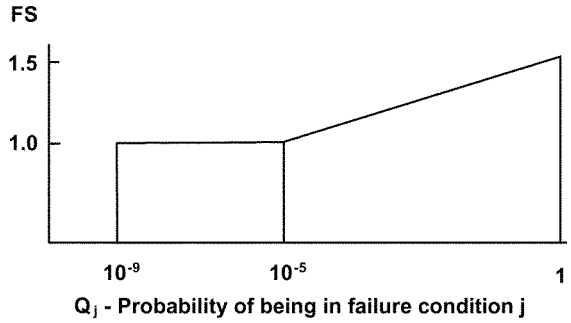

Figure 2: Factor of safety for continuation of flight

$Q_j = (T_j)(P_j)$ where:

T_j = Average time spent in failure condition j (in hours)

P_j = Probability of occurrence of failure mode j (per hour)

Note: If P_j is greater than 10^{-3} per flight hour then a 1.5 factor of safety must be applied to all limit load conditions specified in Subpart C.

(iii) For residual strength substantiation, the airplane must be able to withstand two-thirds of the ultimate loads defined in paragraph 2(b)(2)(ii) of the special conditions. For pressurized cabins, these loads must be combined with the normal operating differential pressure.

(iv) If the loads induced by the failure condition have a significant effect on fatigue or damage tolerance then their effects must be taken into account.

(v) Freedom from aeroelastic instability must be shown up to a speed determined from Figure 3. Flutter clearance speeds V′ and V″ may be based on the speed limitation specified for the remainder of the flight using the margins defined by § 25.629(b).

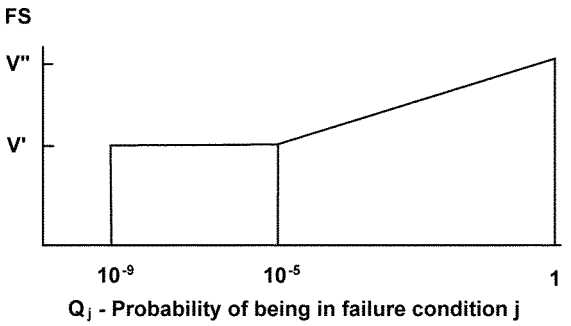

Figure 3: Clearance speed

V′ = Clearance speed as defined by § 25.629(b)(2).

V″ = Clearance speed as defined by § 25.629(b)(1).

$Q_j = (T_j)(P_j)$ where:

T_j = Average time spent in failure condition j (in hours)

P_j = Probability of occurrence of failure mode j (per hour)

Note: If P_j is greater than 10^{-3} per flight hour, then the flutter clearance speed must not be less than V″.

(vi) Freedom from aeroelastic instability must also be shown up to V′ in Figure 3 above, for any probable system failure condition combined with any damage required or selected for investigation by § 25.571(b).

(3) Consideration of certain failure conditions may be required by other sections of 14 CFR part 25 regardless of calculated system reliability. Where analysis shows the probability of these failure conditions to be less than 10^{-9}, criteria other than those specified in this paragraph may be used for structural substantiation to show continued safe flight and landing.

(c) Failure indications. For system failure detection and indication, the following apply:

(1) The system must be checked for failure conditions, not extremely improbable, that degrade the structural capability below the level required by 14 CFR part 25 or significantly reduce the reliability of the remaining system. As far as reasonably practicable, the flightcrew must be made aware of these failures before flight. Certain elements of the control system, such as mechanical and hydraulic components, may use special periodic inspections, and electronic components may use daily checks, in lieu of detection and indication systems to achieve the objective of this requirement. These certification maintenance requirements must be limited to components that are not readily detectable by normal detection and indication systems and where service history shows that inspections will provide an adequate level of safety.

(2) The existence of any failure condition, not extremely improbable, during flight that could significantly affect the structural capability of the airplane and for which the associated reduction in airworthiness can be minimized by suitable flight limitations, must be signaled to the flightcrew. For example, failure conditions that result in a factor of safety between the airplane strength and the loads of Subpart C below 1.25, or flutter margins below V″,

must be signaled to the flightcrew during flight.

(d) Dispatch with known failure conditions. If the airplane is to be dispatched in a known system failure condition that affects structural performance, or affects the reliability of the remaining system to maintain structural performance, then the provisions of these special conditions must be met, including the provisions of paragraph 2(a) for the dispatched condition, and paragraph 2(b) for subsequent failures. Expected operational limitations may be taken into account in establishing P_j as the probability of failure occurrence for determining the safety margin in Figure 1 of these special conditions. Flight limitations and expected operational limitations may be taken into account in establishing Q_j as the combined probability of being in the dispatched failure condition and the subsequent failure condition for the safety margins in Figures 2 and 3 of these special conditions. These limitations must be such that the probability of being in this combined failure state and then subsequently encountering limit load conditions is extremely improbable. No reduction in these safety margins is allowed if the subsequent system failure rate is greater than 10^{-3} per hour.

Issued in Renton, Washington, on November 21, 2012.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2012–28768 Filed 11–27–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Part 774

[Docket No. 120330233–2160–01]

RIN 0694–AF64

Revisions to the Export Administration Regulations (EAR): Control of Military Electronic Equipment and Related Items the President Determines No Longer Warrant Control Under the United States Munitions List (USML)

AGENCY: Bureau of Industry and Security, Department of Commerce.

ACTION: Proposed rule.

SUMMARY: This proposed rule describes how certain articles the President determines no longer warrant control under the United States Munitions List (USML) would be controlled on the Commerce Control List (CCL). Those articles and the USML categories under which they are currently controlled are: Military electronics (Category XI) and certain cryogenic and superconductive equipment designed for installation in military vehicles and that can operate while in motion (Categories VI, VII, VIII, and XV). Military electronics and related items would be controlled by new Export Control Classification Numbers (ECCNs) 3A611, 3B611, 3D611, and 3E611 proposed by this rule. Cryogenic and superconducting equipment for military vehicles and related items would be controlled under new ECCNs 9A620, 9B620, 9D620, and 9E620. This proposed rule also would amend ECCNs 7A001 and 7A101 to apply the missile technology reason for control only to items in those ECCNs on the Missile Technology Control Regime (MTCR) Annex.

This is one in a planned series of proposed rules describing how various types of articles the President determines, as part of the Administration's Export Control Reform Initiative, no longer warrant USML control, would be controlled on the CCL and by the EAR. This proposed rule is being published in conjunction with a proposed rule from the Department of State, Directorate of Defense Trade Controls, which would amend the list of articles controlled by USML Category XI.

DATES: Comments must be received by January 28, 2013.

ADDRESSES: You may submit comments by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* The identification number for this rulemaking is BIS–2012–0045.
- By email directly to *publiccomments@bis.doc.gov.* Include RIN 0694–AF64 in the subject line.
- By mail or delivery to Regulatory Policy Division, Bureau of Industry and Security, U.S. Department of Commerce, Room 2099B, 14th Street and Pennsylvania Avenue NW., Washington, DC 20230. Refer to RIN 0694–AF64.

FOR FURTHER INFORMATION CONTACT: Brian Baker, Director, Electronics and Materials Division, Office of National Security and Technology Transfer Controls, (202) 482–5534, *brian.baker@bis.doc.gov.*

SUPPLEMENTARY INFORMATION:

Background

On July 15, 2011, as part of the Administration's ongoing Export Control Reform Initiative, BIS published a proposed rule (76 FR 41958) (''the July 15 proposed rule'') that set forth a framework for how articles the President determines, in accordance with section 38(f) of the Arms Export Control Act (AECA) (22 U.S.C. 2778(f)), would no longer warrant control on the United States Munitions List (USML) instead would be controlled on the Commerce Control List (CCL).

BIS also published a proposed rule (76 FR 68675, November 7, 2011), primarily dealing with aircraft and related items (''the November 7 proposed rule'') that made additions and modifications to some of the provisions of the July 15 proposed rule.

Following the structure of the July 15 and November 7 proposed rules, this proposed rule describes BIS's proposal for controlling under the EAR's CCL certain military electronic equipment and related articles now controlled by the ITAR's USML Category XI. This proposed rule also would specifically implement in U.S. export control regulations Category ML20 Munitions List of the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies (Wassenaar Arrangement Munitions List or WAML), which pertains to certain cryogenic and superconducting equipment. These items are currently controlled by ''catch all'' provisions of the ITAR's USML Categories VI, VII, VIII, and XV. Finally, this proposed rule would correct two ECCNs in CCL Category 7 to apply the missile technology reason for control only to items that are on the MTCR Annex.

The changes described in this proposed rule and the State Department's proposed amendment to Category XI of the USML are based on a review of Category XI by the Defense Department, which worked with the Departments of State and Commerce in preparing the proposed amendments. The review was focused on identifying the types of articles that are now controlled by USML Category XI that are either (i) inherently military and otherwise warrant control on the USML or (ii) if it is of a type common to non-military electronic equipment applications, possess parameters or characteristics that provide a critical military or intelligence advantage to the United States, and that are almost exclusively available from the United States. If an article satisfied one or both of those criteria, the article remained on the USML. If an article did not satisfy either criterion but was nonetheless a type of article that is, as a result of differences in form and fit, ''specially designed'' for military applications or for the intelligence applications described in proposed ECCN 3A611.b, it was identified in the new ECCNs proposed in this notice. The licensing

requirements and other EAR-specific controls for such items described in this notice would enhance national security by permitting the U.S. Government to focus its resources on controlling, monitoring, investigating, analyzing, and, if need be, prohibiting exports and reexports of more significant items to destinations, end uses, and end users of greater concern than NATO allies and other multi-regime partners.

The Defense Department also reviewed WAML Category ML20, which describes certain cryogenic and superconducting items. These items are not positively listed on the USML, but are nonetheless controlled as non-specific parts, components, accessories of and attachments to items controlled under USML Categories VI, VII, VIII and XV. The Department of Defense concluded that the Category ML20 items are not in production and, even if they were, they would not necessarily provide the United States with a significant military or intelligence advantage warranting control under the ITAR. In addition, the Departments of Commerce and State have not identified evidence of trade in such items. Despite the lack of evidence of production or trade, this proposed rule would list WAML Category ML20 items on the CCL. Such listing is necessary because several State Department proposed rules would, in accordance with the Administration's Export Control Reform Initiative, remove non-specific parts, components, accessories, and attachments from the USML, and, unless added to the Commerce Control List, WAML Category ML20 items would no longer be on any U.S. export control list.

Pursuant to section 38(f) of the AECA, the President is obligated to review the USML ''to determine what items, if any, no longer warrant export controls under'' the AECA. The President must report the results of the review to Congress and wait 30 days before removing any such items from the USML. The report must ''describe the nature of any controls to be imposed on that item under any other provision of law.'' 22 U.S.C. 2778(f)(1).

In the July 15 proposed rule, BIS proposed creating a series of new ECCNs to control items that would be removed from the USML and items currently on the CCL that are also on the Wassenaar Arrangement Munitions List. The proposed rule referred to this series as the ''600 series'' because the third character in each of the new ECCNs would be a ''6.'' The first two characters of the 600 series ECCNs serve the same function as any other ECCN as described in § 738.2 of the EAR. The first character is a digit in the range 0 through 9 that identifies the Category on the CCL in which the ECCN is located. The second character is a letter in the range A through E that identifies the product group within a CCL Category. In the 600 series, the third character is the number 6. With few exceptions, the final two characters identify the WAML category that covers items that are the same or similar to items in a particular 600 series ECCN. The ECCNs that would be created or revised by this proposed rule are described more fully below.

BIS will publish additional **Federal Register** notices containing proposed amendments to the CCL that will describe proposed controls for additional categories of articles the President determines no longer warrant control under the USML. The State Department will publish concurrently proposed amendments to the USML that correspond to the BIS notices. BIS will also publish proposed rules to further align the CCL with the WAML and the Missile Technology Control Regime Equipment, Software and Technology Annex.

The revisions proposed in this rule are part of Commerce's retrospective plan under EO 13563 completed in August 2011. Commerce's full plan can be accessed at: *http://open.commerce.gov/news/2011/08/23/commerce-plan-retrospective-analysis-existing-rules.*

Need To Avoid Ambiguous Classifications or Inadvertent License Requirements

BIS recognizes that because electronics frequently are installed in some other commodity, they are particularly susceptible to ambiguous classification or classification under multiple entries on the CCL. For example, a given electronic device might also be viewed as a part for an aircraft, radar, computer, laser, or some other article. How the device is viewed might affect the classification on the CCL, which could, in turn affect license requirements or licensing policy. BIS's intent is that the new ECCNs in this proposed rule would not increase the number of destinations to which a license is required, alter the policy under which license application are reviewed or create any apparent instances of an item that is subject to the EAR being covered by more than one ECCN. Parties who believe that they can identify instances where the effect of the proposed rule would be contrary to this intent are encouraged to point out those instances in a public comment on this proposed rule.

Detailed Description of Changes Proposed by This Rule

New 3X611 Series of ECCNs

Proposed new ECCNs 3A611, 3B611, 3D611, and 3E611 would control military electronics and related test, inspection, and production equipment and software and technology currently controlled by USML Category XI that the President determines no longer warrant control on the USML. To the extent that they are not enumerated on the proposed revisions to Category XI, these proposed new ECCNs would also control computers, telecommunications equipment, radar ''specially designed'' for military use, parts, components, accessories, and attachments ''specially designed'' therefor, and related software and technology. This structure aligns with the current USML Category XI and ML11, which include within the scope of ''electronics'' such items as computers, telecommunications equipment, and radar. BIS believes that it will be easier to include such items within the scope of the proposed new 600 series that corresponds to USML Category XI rather than creating new 600 series ECCNs in CCL Categories 4 (computers), 5 (telecommunications), and 6 (radar). BIS, however, proposes including cross references in CCL Categories 4, 5, and 6 to alert readers that ECCN 3A611 may control such items.

The proposed 3X611 series, except for 3X611.y, would be controlled for national security (NS Column 1 or NS1), regional stability (RS Column 1 or RS1), antiterrorism (AT Column 1 or AT1) and United Nations embargo (UN) reasons. ECCNs 3X611.y would only be controlled for AT1 reasons (ECCN 3B611 would not have a .y paragraph). Each ECCN in this 3X611 series is described more specifically below.

New ECCN 3A611

Proposed ECCN 3A611 paragraph .a would control electronic ''equipment,'' ''end items,'' and ''systems'' ''specially designed'' for military use that are not enumerated in either a USML category or another ''600 series'' ECCN.

Paragraph .b would be reserved. The corresponding USML Category is XI(b), which will continue to be a catch-all control and will contain the following clarified version of the current Category XI(b): ''Electronic systems or equipment ''specially designed'' for the collection, surveillance, monitoring, or exploitation of the electromagnetic spectrum (regardless of transmission medium), for intelligence or security purposes or for counteracting such activities.'' State's proposed revision to Category XI(b) will

contain references to certain types of equipment and systems that are *per se* within the scope of the revised Category XI(b). BIS encourages the public to comment on whether this approach creates any confusion regarding the jurisdictional status of any items that are commonly used in normal commercial, non-intelligence, or non-security use, including those controlled under ECCN 5A980 (''Devices primarily useful for the surreptitious interception of wire, oral, or electronic communications.'')

Paragraph .c would control microwave monolithic integrated circuit (MMIC) power amplifiers based in general on four parameters: Rated operating frequency; peak saturated power output, fractional bandwidth and power added efficiency. This paragraph covers MMIC power amplifiers with rated operating frequencies ranging from 2.7 GHz through 75 GHz in six subparagraphs ranging from the lowest to the highest operating frequency ranges, with a gap for MMIC power amplifiers rated for an operation frequency range of 31.8 GHz up to and including 37.5 GHz, which are covered by ECCN 3A001.b.2.d. The threshold values of the other three parameters decline as the operating frequency range increases. For the lowest operating frequency range (2.7 GHz through 3.2 GHz), the peak saturated power output parameter is one of three alternative power measurements that define the threshold for inclusion within paragraph .c. The other two are: (1) Average power output and fractional bandwidth; and (2) pulse power output and (3) duty cycle.

Paragraph .d would control discrete radio frequency transistors in five graduated steps over the operating frequency range of 2.7 GHz through 75 GHz, with a gap for transistors with an operating frequency range exceeding 31.8 GHz up to and including 37.5 GHz, which are covered by ECCN 3A001.b.3.c. This paragraph uses the same parameters that as are used to identify MMIC power amplifiers in paragraph .c and, as with MMIC power amplifiers, the threshold values for the other parameters decline as the operating frequency increases.

Paragraph .e would control high frequency (HF) surface wave radar capable of ''tracking'' surface targets on oceans.

Paragraph .f would control microelectronic devices and printed circuit boards that are certified to be a ''trusted device'' from a defense microelectronics activity (DMEA) accredited supplier.

Each of these new ECCNs describes electronic items that BIS understands to be inherently military or otherwise exclusively designed and manufactured for military use. BIS encourages the public to test this understanding and identify items, if any, that fall within the scope of these new ECCNs that are in normal commercial use. If so, the comments should provide details on such commercial applications. In particular, BIS asks the public to comment on whether the controls in proposed new paragraphs 3A611.c (MMICs) and 3A611.d (discrete radio frequency transistors) are sufficiently limited to those not now or likely to be in normal commercial use by U.S. or foreign telecommunications or other non-military applications. The basis for this request is that the current USML Category XI(c) does not now control any electronic parts, components, accessories, attachments, or associated equipment ''in normal commercial use'' even if they were ''specifically designed or modified for use with the equipment'' controlled in USML categories XI(a) or XI(b), which are, in essence, electronic equipment ''specifically designed, modified, or configured for military application.'' One of the goals of the reform effort is to ensure that items that are currently EAR controlled are not unintentionally made ITAR or ''600 series'' controlled, through the creation of more positive lists. This objective, however, does not preclude the possibility of the Administration intentionally making ITAR or ''600 series'' controlled items that are today subject to the other parts of the EAR.

Paragraphs .g through .w would be reserved.

Paragraph .x would control ''parts,'' ''components,'' ''accessories'' and ''attachments'' that are ''specially designed'' for a commodity controlled by ECCN 3A611 or for an article controlled by USML Category XI, and not enumerated in a USML Category.

A note is proposed for ECCN 3A611.x clarifying that electronic parts, components, accessories, and attachments that are ''specially designed'' for military use that are not enumerated in any USML Category but are within the scope of a ''600 series'' ECCN are controlled by that ''600 series'' ECCN. Thus, for example, electronic components not enumerated on the USML that are ''specially designed'' for a military aircraft controlled by USML Category VIII or ECCN 9A610 would be controlled by ECCN 9A610.x. Similarly, electronic components not enumerated on the USML that are ''specially designed'' for a military vehicle controlled by USML Category VII or ECCN 0A606 would be controlled by ECCN 0A606.x. The purpose of this note and the limitations in ECCN 3A611.x is to prevent any overlap of controls over electronics specially designed for particular types of items described in other 600 series ECCNs (which would not be controlled by 3A611.x) and all other electronic parts, components, accessories, and attachments specially designed for military electronics that are not enumerated on the USML (which would be controlled by ECCN 3A611.x).

A second note proposed for ECCN 3A611.x specifies that ECCN 3A611.x controls parts and components ''specially designed'' for underwater sensors or projectors controlled by proposed USML Category XI(c)(12) containing single-crystal lead magnesium niobate lead titanate (PMN–PT) based piezoelectrics.

ECCN 3A611 also would contain a paragraph .y for items of little or no military significance that would be controlled only for AT1 reasons.

New ECCN 3B611

Proposed ECCN 3B611 would impose controls on test, inspection, and production end items and equipment ''specially designed'' for items controlled in ECCN 3A611 or USML Category XI that are not enumerated in USML XI or controlled by a ''600 series'' ECCN under paragraph .a and for ''parts,'' ''components,'' ''accessories'' and ''attachments'' that are ''specially designed'' for such test, inspection and production end items and equipment that are not enumerated on the USML or controlled by another ''600 series'' ECCN under paragraph .x.

New ECCN 3D611

Proposed ECCN 3D611 would impose controls on software ''specially designed'' for the ''development,'' ''production,'' operation, or maintenance of commodities controlled by 3A611 or 3B611 other than software for 3A611.y or 3B611.y.

New ECCN 3E611

Proposed ECCN 3E611 would impose controls on ''technology'' ''required'' for the ''development,'' ''production,'' operation, installation, maintenance, repair, or overhaul of commodities or software controlled by ECCN 3A611, 3B611 or 3D611 (except technology for 3A611.y, 3B611.y and 3D611.y), which would be controlled for AT1 reasons only.

Revisions to ECCNs 3A101 and 4A003

The analog-to-digital converters described in the proposed revision to

3A101.a would become subject to the EAR. Currently ECCN 3A101 is refers readers to the ITAR for analog-to-digital converters described in paragraph .a. These converters are and would continue to be controlled for MT reasons because they are identified on the Missile Technology Control Regime Annex. Placing such items in this ECCN rather than the new 3A611 will make it easier to identify, classify, and control such items. Consequently, this proposed rule adds analog-to-digital converters useable in ''missiles'' and having any of the characteristics described in proposed 3A101.a.1, a.2, a.3, or a.4.

In addition, adding the new text in 3A101.a.4 for electrical input type analog-to-digital converter printed circuit boards or modules requires that this proposed rule amend ECCN 4A003 to add an MT control for items classified under ECCN 4A003.e when meeting or exceeding the parameters described in ECCN 3A101.a.4. This amendment is necessary as the MT items in new paragraph 3A101.a.4 are a subset of the items in paragraph 4A003.e.

Revisions to ECCN 5A001

This proposed rule revises the Related Controls paragraph in ECCN 5A001 to provide more detailed references to telecommunications equipment subject to the ITAR under USML Categories XI and XV, while maintaining references to ECCNs 5A101, 5A980, and 5A991.

New Cross Reference ECCNs

Three new cross reference ECCNs would be created to alert readers that computers, telecommunications equipment, and radar—and parts, components, accessories and attachments ''specially designed'' therefor—are controlled by ECCN 3A611 if they are specially designed for military use. These cross references are intended to reduce the likelihood of confusion that might otherwise arise because computers, telecommunications equipment, and radar generally are in CCL Categories 4, 5 (Part 1) and 6, respectively. The new cross reference ECCNs and the Categories in which they would appear are: 4A611, Category 4; 5A611, Category 5, Part 1; and 6A611, Category 6.

Corrections to ECCNs 7A006 and 7D101

This proposed rule would correct the reasons for control paragraph of ECCN 7A006 to state that the missile technology reason for control applies to those items covered by ECCN 7A006 that also meet or exceed the parameters of ECCN 7A106. ECCN 7A006 now applies the missile technology reason for control to a range of airborne altimeters that extends beyond the range of altimeters that are on the MTCR annex. BIS's practice is to apply the missile technology reason for control only to items on that annex. This proposed change would make ECCN 7A006 conform to that practice. Similarly, this proposed rule would add the phrase ''for missile technology reasons'' to the heading of ECCN 7D101. ECCN 7D101 applies the missile technology reason for control to software for a range of commodity ECCNs. Not all of those commodities are controlled for missile technology reasons. The text proposed here would limit the scope of missile technology controls in ECCN 7A106 to commodities on the MTCR Annex and that of ECCN 7D101 to software for commodities on the MTCR Annex.

New 9X620 Series of ECCNs

Proposed ECCNs 9A620, 9B620, 9D620, and 9E620 would apply NS1, RS1, AT1 and UN reasons for control to cryogenic and superconducting equipment described in Category ML20 of the Wassenaar Arrangement Munitions List and to test, inspection and production equipment, software and technology therefor. Category ML20 covers cryogenic and superconducting equipment that is ''specially designed'' to be installed in a vehicle for military ground, marine, airborne, or space applications. BIS believes that such equipment is used in experimental or developmental vehicle propulsion systems that employ superconducting components and cryogenic equipment to cool those components to temperatures at which they superconduct. BIS has not identified evidence of trade in such items. To the extent that exports do exist, the items would be subject to the license requirements of the USML Category that controls the vehicle into which the equipment would be installed, *i.e.,* Category VI, surface vessels; Category VII, ground vehicles; Category VIII, aircraft; and Category XV, spacecraft. BIS proposes to place this cryogenic and superconducting equipment, its related test, inspection and production equipment, and its related software and technology into a single set of 600 series ECCNs ending with the digits ''20'' to correspond to the relevant Wassenaar Arrangement Munitions List Category. This approach would further the administration's Export Control Reform Initiative goal of aligning U.S. controls with multilateral controls wherever feasible. Each ECCN in this series is described more specifically below.

New ECCN 9A620

Paragraph a. would control equipment ''specially designed'' to be installed in a vehicle for military ground, marine, airborne, or space applications, capable of operating while in motion and of producing or maintaining temperatures below 103 K (−170 °C). Paragraph b. would control ''superconductive'' electrical equipment (rotating machinery and transformers) ''specially designed'' to be installed in a vehicle for military ground, marine, airborne, or space applications, and capable of operating while in motion. Paragraph x. would control parts, components, accessories and attachments that were ''specially designed'' for a commodity controlled by ECCN 9A620.

New ECCN 9B620

Proposed ECCN 9B620 would control test, inspection, and production end items and equipment ''specially designed'' for items controlled in proposed ECCN 9A620.

New ECCN 9D620

Proposed ECCN 9D620 would control software ''specially designed'' for the ''development,'' ''production,'' operation, or maintenance of commodities controlled by ECCNs 9A620 or 9B620.

New ECCN 9E620

Proposed ECCN 9E620 would control a ''technology'' ''required'' for the ''development,'' ''production,'' operation, installation, maintenance, repair, or overhaul of commodities or software controlled by ECCNs 9A620, 9B620 or 9D620.

Proposed New ECCNs and License Exception STA

One of the objectives of the Export Control Reform effort is to align the jurisdictional status of technology and software with the items to which they relate. Thus, for example, all technical data and software directly related to a defense article, *i.e.,* an item identified on the ITAR's USML, will also be ITAR controlled. All technology, including technical data, and software for the production, development, or other aspects of an item on the EAR's CCL will be subject to the EAR. Nevertheless, some types of software and technology are more significant than the commodities that are developed or produced from or that utilize such software or technology. In recognition of that fact, this proposed rule would preclude use of License Exception STA for software and technology (other than build-to-print technology) for (1) Helix traveling wave tubes (TWTs); (2)

Transmit/receive or transmit modules; (3) Microwave monolithic integrated circuits (MMIC)s; and (4) Discrete radio frequency transistors that would be controlled by ECCN 3A611.

Request for Comments

All comments must be in writing and submitted via one or more of the methods listed under the **ADDRESSES** caption to this notice. All comments (including any personal identifiable information) will be available for public inspection and copying. Those wishing to comment anonymously may do so by submitting their comment via *regulations.gov* and leaving the fields for identifying information blank.

Effects of This Proposed Rule

Use of License Exceptions

Military electronic equipment, certain cryogenic and superconducting equipment, and parts, components, and test, inspection, and production equipment therefor currently on the USML that this rule would place on the CCL would become eligible for several license exceptions, including STA, which would be available for exports to certain government agencies of NATO and other multi-regime close allies. The exchange of information and statements required under STA is substantially less burdensome than are the license application requirements currently required under the ITAR, as discussed in more detail in the ''Regulatory Requirements'' section of this proposed rule. This proposed rule does not move any items currently on the CCL to a 600 series ECCN; therefore, it would not narrow the scope of license exception eligibility for any items currently on the CCL.

Alignment With the Wassenaar Arrangement Munitions List

The Administration has stated since the beginning of the Export Control Reform Initiative that the reforms will be consistent with the obligations of the United States to the multilateral export control regimes. Accordingly, the Administration will, in this and subsequent proposed rules, exercise its national discretion to implement, clarify, and, to the extent feasible, align its controls with those of the regimes. This proposed rule would maintain the alignment that exists between the USML, in which military electronics are controlled under Category XI, and the WAML, in which military electronic equipment is controlled under ML11 and would be controlled by ECCN 3A611 in this proposed rule. Similarly, 3B611 aligns with WAML 18, which, *inter alia,* controls ''specially designed or modified 'production' equipment for the 'production' of products specified by the Munitions List, and specially designed components therefor.''

This proposed rule would align cryogenic and superconducting equipment currently controlled in Categories VI, VII, VIII, and XV with Wassenaar Arrangement Munitions List Category ML20 by controlling them under ECCN 9A620. As with other 600 series ECCNs, this rule follows the existing CCL numbering pattern for test, inspection and production equipment (3B611 and 9B620), software (3D611 and 9D620) and technology (3E611 and 9E620) rather than strictly following the Wassenaar Arrangement Munitions List pattern of placing production equipment, software and technology for munitions list items in categories ML18, ML21 and ML22, respectively. BIS believes that including the ECCNs for test, inspection and production equipment, software, and technology in the same category as the items to which they relate results in an easier to understand CCL than would separate categories.

Although the Export Administration Act expired on August 20, 2001, the President, through Executive Order 13222 of August 17, 2001, 3 CFR, 2001 Comp., p. 783 (2002), as extended by the Notice of August 15, 2012, 77 FR 49699 (August 16, 2012), has continued the Export Administration Regulations in effect under the International Emergency Economic Powers Act. BIS continues to carry out the provisions of the Export Administration Act, as appropriate and to the extent permitted by law, pursuant to Executive Order 13222.

Rulemaking Requirements

1. Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distribute impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated a ''significant regulatory action,'' although not economically significant, under section 3(f) of Executive Order 12866. Accordingly, the rule has been reviewed by the Office of Management and Budget (OMB).

2. Notwithstanding any other provision of law, no person is required to respond to, nor is subject to a penalty for failure to comply with, a collection of information, subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA), unless that collection of information displays a currently valid OMB control number. This proposed rule would affect two approved collections: Simplified Network Application Processing System (control number 0694–0088), which includes, among other things, license applications, and License Exceptions and Exclusions (0694–0137).

As stated in the proposed rule published at 76 FR 41958 (July 15, 2011), BIS believed that the combined effect of all rules to be published adding items to the EAR that would be removed from the ITAR as part of the administration's Export Control Reform Initiative would increase the number of license applications to be submitted by approximately 16,000 annually. As the review of the USML has progressed, the interagency group has gained more specific information about the number of items that would come under BIS jurisdiction whether those items would be eligible for export under license exception. As of June 21, 2012, BIS believes the increase in license applications may be 30,000 annually, resulting in an increase in burden hours of 8,500 (30,000 transactions at 17 minutes each) under control number 0694–0088.

Military electronic equipment, certain cryogenic and superconducting equipment, related test, inspection and production equipment, ''parts,'' ''components,'' ''accessories'' and ''attachments,'' ''software'' and ''technology'' formerly on the USML would become eligible for License Exception STA under this rule. BIS believes that the increased use of License Exception STA resulting from the combined effect of all rules to be published adding items to the EAR that would be removed from the ITAR as part of the administration's Export Control Reform Initiative would increase the burden associated with control number 0694–0137 by about 23,858 hours (20,450 transactions @ 1 hour and 10 minutes each).

BIS expects that this increase in burden would be more than offset by a reduction in burden hours associated with approved collections related to the ITAR. The largest impact of the proposed rule would likely apply to exporters of replacement parts for military electronic equipment that has been approved under the ITAR for export to allies and regime partners. Because, with few exceptions, the ITAR

allows exemptions from license requirements only for exports to Canada, most exports of such parts, even when destined to NATO and other close allies, require specific State Department authorization. Under the EAR, as proposed in this notice, such parts would become eligible for export to NATO and other multi-regime allies under License Exception STA. Use of License Exception STA imposes a paperwork and compliance burden because, for example, exporters must furnish information about the item being exported to the consignee and obtain from the consignee an acknowledgement and commitment to comply with the EAR. However, the Administration understands that complying with the burdens of STA is likely less burdensome than applying for licenses. For example, under License Exception STA, a single consignee statement can apply to an unlimited number of products, need not have an expiration date, and need not be submitted to the government in advance for approval. Suppliers with regular customers can tailor a single statement and assurance to match their business relationship rather than applying repeatedly for licenses with every purchase order to supply reliable customers in countries that are close allies or members of export control regimes or both.

Even in situations in which a license would be required under the EAR, the burden is likely to be reduced compared to the license requirement of the ITAR. In particular, license applications for exports of technology controlled by ECCN 3E611 are likely to be less complex and burdensome than the authorizations required to export ITAR-controlled technology, *i.e.,* Manufacturing License Agreements and Technical Assistance Agreements.

3. This rule does not contain policies with Federalism implications as that term is defined under E.O. 13132.

4. The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 *et seq.,* generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to the notice and comment rulemaking requirements under the Administrative Procedure Act (5 U.S.C. 553) or any other statute, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Under section 605(b) of the RFA, however, if the head of an agency certifies that a rule will not have a significant impact on a substantial number of small entities, the statute does not require the agency to prepare a regulatory flexibility analysis. Pursuant to section 605(b), the Chief Counsel for Regulation, Department of Commerce, submitted a memorandum to the Chief Counsel for Advocacy, Small Business Administration, certifying that this proposed rule will not have a significant impact on a substantial number of small entities.

Number of Small Entities

The Bureau of Industry and Security (BIS) does not collect data on the size of entities that apply for and are issued export licenses. Although BIS is unable to estimate the exact number of small entities that would be affected by this rule, it acknowledges that this rule would affect some unknown number.

Economic Impact

This proposed rule is part of the Administration's Export Control Reform Initiative. Under that initiative, the United States Munitions List (22 CFR part 121) (USML) would be revised to be a ''positive'' list, *i.e.,* a list that does not use generic, catch-all controls on any part, component, accessory, attachment, or end item that was in any way specifically modified for a defense article, regardless of the article's military or intelligence significance or non-military applications. At the same time, articles that are determined to no longer warrant control on the USML would become controlled on the Commerce Control List (CCL). Such items, along with certain military items that currently are on the CCL, will be identified in specific Export Control Classification Numbers (ECCNs) known as the ''600 series'' ECCNs. In practice, the greatest impact of this rule on small entities would likely be reduced administrative costs and reduced delay for exports of items that are now on the USML but would become subject to the EAR.

This rule focuses on Category XI articles, which are, in essence, military and intelligence-related electronic equipment, ''parts,'' ''components,'' and ''accessories'' and ''attachments'' therefor; test, inspection and production equipment for military electronic equipment and ''parts,'' ''components'' and ''accessories and attachments'' therefor, and related software and technology and on certain laser and radar altimeters that currently are controlled under Category IV of the USML.

Electronic equipment related to certain military or intelligence-gathering functions would remain on the USML. However, parts, components, accessories and attachments for that equipment would be included on the CCL unless expressly enumerated on the USML. Such parts and components are more likely to be produced by small businesses than complete items of electronic equipment, which would in many cases become subject to the EAR. Moreover, officials of the Department of State have informed BIS that license applications for such parts and components are a high percentage of the license applications for USML articles review by that department. One of the purposes of this proposed change is to ensure the ''right sizing'' of controls on military electronics. The current USML Category XI is little more than a ''catch-all'' paragraph that controls all equipment specifically designed or modified for military use and all parts, components, accessories specifically designed or modified for such equipment, except those ''in normal commercial use,'' regardless of the age, sensitivity, availability, or military significance of the electronics. The proposed changes in this rule will not result in the decontrol of such items, but will allow for reduction in administrative and collateral regulatory burdens by, for example, allowing for the use of License Exception STA for exports when the ultimate end user is in a NATO and other multi-regime allied country.

Thus, changing the jurisdictional status of Category XI articles would reduce the burden on small entities (and other entities as well) through: Elimination of some license requirements, greater availability of license exceptions, simplification of license application procedures, and reduction (or elimination) of registration fees. In addition, parts and components controlled under the ITAR remain under ITAR control when incorporated into foreign-made items, regardless of the significance or insignificance of the item, discouraging foreign buyers from incorporating such U.S. content. The availability of *de minimis* treatment under the EAR may reduce the incentive for foreign manufacturers to avoid purchasing U.S.-origin parts and components.

Exporters and reexporters of the Category XI articles, particularly parts and components, that would be placed on the CCL by this rule would need fewer licenses because their transactions would become eligible for license exceptions that apply to shipments to United States Government agencies, shipments valued at less than $1,500, parts and components being exported for use as replacement parts, temporary exports, and License Exception Strategic Trade Authorization (STA). License

Exceptions under the EAR would allow suppliers to send routine replacement parts and low level parts to NATO and other close allies and export control regime partners for use by those governments and for use by contractors building equipment for those governments or for the U.S. government without having to obtain export licenses. Under License Exception STA, the exporter would need to furnish information about the item being exported to the consignee and obtain a statement from the consignee that, among other things, would commit the consignee to comply with the EAR and other applicable U.S. laws.

Because such statements and obligations can apply to an unlimited number of transactions and have no expiration date, they would impose a net reduction in burden on transactions that the government routinely approves through the license application process that the License Exception STA statements would replace.

Even for exports and reexports in which a license would be required, the process would be simpler and less costly under the EAR. When a USML Category XI article or Category IV altimeter moved to the CCL, the number of destinations for which a license is required would remain unchanged. However, the burden on the license applicant would decrease because the licensing procedure for CCL items is simpler and more flexible that the license procedure for UMSL articles.

Under the USML licensing procedure, an applicant must include a purchase order or contract with its application. There is no such requirement under the CCL licensing procedure. This difference gives the CCL applicant at least two advantages. First, the applicant has a way of determining whether the U.S. Government will authorize the transaction before it enters into potentially lengthy, complex, and expensive sales presentations or contract negotiations. Under the USML procedure, the applicant will need to caveat all sales presentations with a reference to the need for government approval and is more likely to have to engage in substantial effort and expense only to find that the government will reject the application. Second, a CCL license applicant need not limit its application to the quantity or value of one purchase order or contract. It may apply for a license to cover all of its expected exports or reexports to a particular consignee over the life of a license (normally two years, but may be longer if circumstances warrant a longer period), reducing the total number of licenses for which the applicant must apply.

In addition, many applicants exporting or reexporting items that this rule would transfer from the USML to the CCL would realize cost savings through the elimination of some or all registration fees currently assessed under the USML's licensing procedure. Currently, USML applicants must pay to use the USML licensing procedure even if they never actually are authorized to export. Registration fees for manufacturers and exporters of articles on the USML start at $2,250 per year, increase to $2,750 for organizations applying for one to ten licenses per year and further increases to $2,750 plus $250 per license application (subject to a maximum of three percent of total application value) for those who need to apply for more than ten licenses per year. There are no registration or application processing fees for applications to export items listed on the CCL. Once the Category XI articles and Category IV altimeters that are the subject to this rulemaking are added to the CCL and removed from the USML, entities currently applying for licenses from the Department of State would find their registration fees reduced if the number of USML licenses those entities need declines. If an entity's entire product line is moved to the CCL, then its ITAR registration and registration fee requirement would be eliminated.

De minimis treatment under the EAR would become available for all items that this rule would transfer from the USML to the CCL. Items subject to the ITAR remain subject to the ITAR when they are incorporated abroad into a foreign-made product regardless of the percentage of U.S. content in that foreign-made product. Foreign-made products that incorporate items that this rule would move to the CCL would be subject to the EAR only if their total controlled U.S.-origin content exceeded 10 percent. Because including small amounts of U.S.-origin content would not subject foreign-made products to the EAR, foreign manufacturers would have less incentive to avoid such U.S.-origin parts and components, a development that potentially would mean greater sales for U.S. suppliers, including small entities.

This rule also contains proposed EAR controls on cryogenic and superconducting equipment ''specially designed'' to be installed in a vehicle for military ground, marine, airborne, or space applications, and related test, inspection and production equipment, software and technology. BIS believes that these items are largely experimental or developmental and has not identified evidence of trade in such items. Therefore, removing them from the USML and adding them to the CCL is unlikely to have a significant impact on large or small entities.

Conclusion

BIS is unable to determine the precise number of small entities that would be affected by this rule. Based on the facts and conclusions set forth above, BIS believes that any burdens imposed by this rule would be offset by the reduction in the number of items that would require a license, increased opportunities for use of license exceptions for exports to certain countries, simpler export license applications, reduced or eliminated registration fees and application of a *de minimis* threshold for foreign-made items incorporating U.S.-origin parts and components, which would reduce the incentive for foreign buyers to design out or avoid U.S.-origin content. For these reasons, the Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this rule, if adopted in final form, would not have a significant economic impact on a substantial number of small entities.

List of Subjects in 15 CFR Part 774

Exports, Reporting and recordkeeping requirements.

Accordingly, part 774 of the Export Administration Regulations (15 CFR parts 730–774) is proposed to be amended as follows:

PART 774—[AMENDED]

1. The authority citation for 15 CFR part 774 continues to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.;* 50 U.S.C. 1701 *et seq.;* 10 U.S.C. 7420; 10 U.S.C. 7430(e); 22 U.S.C. 287c, 22 U.S.C. 3201 *et seq.,* 22 U.S.C. 6004; 30 U.S.C. 185(s), 185(u); 42 U.S.C. 2139a; 42 U.S.C. 6212; 43 U.S.C. 1354; 15 U.S.C. 1824a; 50 U.S.C. app. 5; 22 U.S.C. 7201 *et seq.;* 22 U.S.C. 7210; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of August 15, 2012, 77 FR 49699 (August 16, 2012).

2. In Supplement No. 1 to Part 774, Category 3, amend Export Control Classification Number (ECCN) 3A101 by:

a. Revising the Related Controls paragraph in the List of Items Controlled section; and

b. Revising paragraph a. in the Items paragraph in the List of Items Controlled section, to read as follows:

Supplement No. 1 to Part 774—The Commerce Control List

* * * * *

3A101 Electronic Equipment, Devices and Components, Other Than Those Controlled by 3A001, as Follows (See List of Items Controlled)

* * * * *

List of Items Controlled

* * * * *

Related Controls: See also ECCN 4A003.e for controls on electrical input type analog-to-digital converter printed circuit boards or modules.

* * * * *

Items:

a. Analog-to-digital converters useable in ''missiles,'' and having any of the following characteristics:

a.1. ''Specially designed'' to meet military specifications for ruggedized equipment;

a.2. Analog-to-digital converter microcircuits which are radiation-hardened;

a.3. Analog-to-digital converter microcircuits having all of the following characteristics:

a.3.a. Having a quantization corresponding to 8 bits or more when coded in the binary system;

a.3.b. Rated for operation in the temperature range from −54 °C to above +125 °C; and

a.3.c. Hermetically sealed; or

a.4. Electrical input type analog-to-digital converter printed circuit boards or modules having all of the following characteristics:

a.4.a. Having a quantization corresponding to 8 bits or more when coded in the binary system;

a.4.b. Rated for operation in the temperature range from below −45°C to above +55°C; and

a.4.c. Incorporating microcircuits identified in 3A101.a.2 or a.3;

* * * * *

3. In Supplement No. 1 to Part 774, between the entries for ECCNs 3A292 and 3A980, add new entry for ECCN 3A611 to read as follows:

3A611 Military Electronics, as Follows (See List of Items Controlled)

Reason for Control: NS, RS, AT, UN

Control(s)	Country chart
NS applies to entire entry except 3A611.y.	NS Column 1
RS applies to entire entry except 3A611.y.	RS Column 1
AT applies to entire entry.	AT Column 1
UN applies to entire entry except 3A611.y.	See § 746.1(b) for UN controls

License Exceptions

LVS: $1500 (except for ECCN 3A611.c)
GBS: N/A
CIV: N/A

STA: Paragraph (c)(2) of License Exception STA (§ 740.20(c)(2)) of the EAR may not be used for any item in 3A611.

List of Items Controlled

Unit: End items in number; parts, component, accessories and attachments in $ value

Related Controls: (1) Electronic items that are enumerated in USML Category XI or other USML categories, and technical data (including software) directly related thereto, are subject to the ITAR. (2) Electronic items ''specially designed'' for military use that are not controlled in any USML category but are within the scope of another ''600 series'' ECCN are controlled by that ''600 series'' ECCN. Thus, ECCN 3A611 controls only electronic items ''specially designed'' for a military use that are not otherwise within the scope of a USML Category or ''600 series'' ECCN other than ECCN 3A611. For example, electronic components not enumerated on the USML or another 600 series entry that are ''specially designed'' for a military aircraft controlled by USML Category VIII or ECCN 9A610 are controlled by the catch-all control in ECCN 9A610.x. Electronic components not enumerated on the USML or another 600 series entry that are ''specially designed'' for a military vehicle controlled by USML Category VII or ECCN 0A606 are controlled by ECCN 0A606.x. Electronic components not enumerated on the USML that are ''specially designed'' for a missile controlled by USML Category IV are controlled by ECCN 0A604.

Related Definitions: N/A

Items:

a. Electronic ''equipment,'' ''end items,'' and ''systems'' ''specially designed'' for military use that are not enumerated in either a USML category or another ''600 series'' ECCN.

Note: ECCN 3A611.a includes any radar, telecommunications, or computer equipment, end items, or systems ''specially designed'' for military use that are not enumerated in any USML category or controlled by a ''600 series'' ECCN.

b. [Reserved]

c. Microwave ''monolithic integrated circuits'' (MMIC) power amplifiers having any of the following:

1. Rated for operation at frequencies of 2.7 GHz up to and including 3.2 GHz, having a power added efficiency of 30% or greater, and having any of the following:

a. An average output power greater than 15 W (41.7 dBm) with a ''fractional bandwidth'' greater than 15%;

b. A pulse power output greater than 75 W (48.75 dBm) and a duty cycle of 20% or more; or

c. A 'peak saturated power output' greater than 75 W (48.75 dBm);

2. Rated for operation at frequencies exceeding 3.2 GHz up to and including 6.8 GHz and with a 'peak saturated power output greater' than 40W (46 dBm) with a ''fractional bandwidth'' greater than 15% and a power added efficiency of 40% or greater;

3. Rated for operation at frequencies exceeding 6.8 GHz up to and including 16 GHz and with a 'peak saturated power output' greater than 10W (40 dBm) with a ''fractional bandwidth'' greater than 10% and a power added efficiency of 35% or greater;

4. Rated for operation at frequencies exceeding 16 GHz up to and including 31.8 GHz and with a 'peak saturated power output' greater than 5 W (37 dBm) with a ''fractional bandwidth'' greater than 10% and a power added efficiency of 30% or greater;

Note to paragraph .c.4: See ECCN 3A001.b.2.d for MMIC power amplifiers that are rated for operation at frequencies exceeding 31.8 GHz up to and including 37.5 GHz.

5. Rated for operation at frequencies exceeding 37.5 GHz up to and including 43.5 GHz and with a 'peak saturated power output' greater than 2.5 W (34dBm) with a ''fractional bandwidth'' greater than 10% and a power added efficiency of 15% or greater; or

6. Rated for operation at frequencies exceeding 43.5 GHz up to and including 75 GHz and with a 'peak saturated power output' greater than 2.0 W (33dBm) with a ''fractional bandwidth'' greater than 5% and a power added efficiency of 10% or greater.

Note 1 to paragraph c: See ECCN 3A001.b.2.f for MMIC power amplifiers that are rated for operation at frequencies exceeding 75 GHz.

Note 2 to paragraph c: 'Peak saturated power output' is defined as that value where an increase in input rf power does not produce a concurrent increase in rf output power and may also be referred to as output power, saturated power output, maximum power output, peak power output, or peak envelope power output.

d. Discrete microwave transistors having any of the following:

1. Rated for operation at frequencies of 2.7 GHz up to and including 3.2 GHz, having a power added efficiency of 30% or greater, and having any of the following:

a. An average output power greater than 48 W (46.8 dBm);

b. A pulse power output greater than 240 W (53.8 dBm) and a duty cycle of 20% or more; or

c. A 'peak saturated power output' greater than 240 W (53.8 dBm);

2. Rated for operation at frequencies exceeding 3.2 GHz up to and including 6.8 GHz and having a 'peak saturated power output' greater than 60W (47.8 dBm) and a power added efficiency of 45% or greater;

3. Rated for operation at frequencies exceeding 6.8 GHz up to and including 31.8 GHz and having a 'peak saturated power output' greater than 20W (43 dBm) and a power added efficiency of 35% or greater;

Note to paragraph.d.3: See ECCN 3A001.b.3.c for discrete microwave transistors that are rated for operation at frequencies exceeding 31.8 GHz up to and including 37.5 GHz.

4. Rated for operation at frequencies exceeding 37.5 GHz up to and including 43.5 GHz and having a 'peak saturated power output' greater than 1W (30 dBm) and a power added efficiency of 20% or greater; or

5. Rated for operation at frequencies exceeding 43.5 GHz up to and including 75

GHz and having a 'peak saturated power output' greater than 0.5W (27 dBm) and a power added efficiency of 15% or greater; or

Note 1 to paragraph .d: See ECCN 3A001.b.3.e for discrete microwave transistors that are rated for operation at frequencies exceeding 75 GHz.

Note 2 to paragraph .d: 'Peak saturated power output' is defined as that value where an increase in input rf power does not produce a concurrent increase in rf output power and may also be referred to as saturated power, output power, saturated power output, maximum power output, peak power output, or peak envelope power output.

e. High frequency (HF) surface wave radar capable of ''tracking'' maritime surface targets or low altitude airborne targets.

Note: ECCN 3A611.e does not apply to systems, equipment, and assemblies ''specially designed'' for marine traffic control.

f. Microelectronic devices or printed circuit boards not otherwise controlled on the USML that are certified to be a 'trusted device' from a defense microelectronics activity (DMEA) accredited supplier.

Note: A ''trusted device'' is a device that is certified as produced or manufactured under accredited defense microelectronics activity (DMEA) procedures at a ''trusted foundry,'' a ''trusted source,'' or an ''accredited supplier.'' A ''trusted foundry'' is a semiconductor foundry that is accredited through the defense microelectronics activity (DMEA) to be a trusted source for the following services: design, foundry services, packaging, assembly, and test. A ''trusted source,'' or DMEA ''accredited supplier,'' is a source or supplier that is accredited through DMEA to be a trusted source for the following services: design, foundry services, packaging, assembly, and test. Not all devices developed or manufactured by a company that is a trusted foundry, trusted source, or accredited supplier are per se ''trusted devices.'' Thus, ECCN 3A001.f does not include or apply to any other device that is not a ''trusted device'' manufactured or exported by such companies.

g. through w. [Reserved]

x. ''Parts,'' ''components,'' ''accessories'' and ''attachments'' that are ''specially designed'' for a commodity controlled by ECCN 3A611 or for an article controlled by USML Category XI, and not enumerated in a USML Category.

Note 1 to ECCN 3A611.x: ECCN 3A611.x includes parts, components, accessories, and attachments ''specially designed'' for a radar, telecommunications, or computer ''specially designed'' for military use that are neither enumerated in any USML Category nor controlled in another ''600 series'' ECCN.

Note 2 to ECCN 3A611.x: ECCN 3A611.x controls parts and components ''specially designed'' for underwater sensors or projectors controlled by USML Category XI(c)(12) containing single-crystal lead magnesium niobate lead titanate (PMN–PT) based piezoelectrics.

y. Specific ''parts,'' ''components,'' ''accessories'' and ''attachments'' ''specially designed'' for a commodity subject to control in this ECCN and not elsewhere specified in the CCL, as follows:

y.1. Electric couplings
y.2. Cathode ray tubes (CRTs)
y.3. Electrical connectors
y.4. Electric fans
y.5. Rotron fans
y.6. Electric fuses other than those specially designed for explosive detonation
y.7. Grid vacuum tubes
y.8. Audio headphones, earphones, handsets, and headsets
y.9. Heat sinks
y.10. Intercom systems
y.11. Joy sticks
y.12. Loudspeakers
y.13. Mica paper capacitors
y.14. Microphones
y.15. Potentiometers
y.16. Rheostats
y.17. Electric connector backshells
y.18. Solenoids
y.19. Speakers
y.20. Electric switches other than RF, pressure, diplexer, duplexer, circulator, or isolator switches
y.21. Trackballs
y.22. Electric transformers
y.23. Vacuum tubes other than TWTs, klystron tubes, or tubes specially designed for articles enumerated in USML Category XII
y.24. Waveguide

4. In Supplement No. 1 to Part 774, between the entries for ECCNs 3B002 and 3B991, add new entry for ECCN 3B611 to read as follows:

3B611 Test, Inspection, and Production Commodities for Military Electronics, as Follows (See List of Items Controlled)

License Requirements

Reason for Control: NS, RS, AT, UN

Control(s)	*Country chart*
NS applies to entire entry.	NS Column 1
RS applies to entire entry.	RS Column 1
AT applies to entire entry.	AT Column 1
UN applies to entire entry.	See § 746.1(b) for UN controls

License Exceptions

LVS: $1500
GBS: N/A
CIV: N/A
STA: Paragraph (c)(2) of License Exception STA (§ 740.20(c)(2)) of the EAR may not be used for any item in 3B611.

List of Items Controlled

Unit: N/A
Related Controls: N/A
Related Definitions: N/A
Items:

a. Test, inspection, and production end items and equipment ''specially designed'' for items controlled in ECCN 3A611 or USML Category XI that are not enumerated in USML XI or controlled by another ''600 series'' ECCN.

b. through w. [Reserved]

x. ''Parts,'' ''components,'' ''accessories'' and ''attachments'' that are ''specially designed'' for a commodity listed in this entry and that are not enumerated on the USML or controlled by another ''600 series'' ECCN.

5. In Supplement No. 1 to Part 774, between the entries for ECCNs 3D101 and 3D980, add a new entry for ECCN 3D611 to read as follows:

3D611 ''Software'' ''Specially Designed'' for Military Electronics, as Follows (See List of Items Controlled)

License Requirements

Reason for Control: NS, RS, AT, UN

Control(s)	*Country chart*
NS applies to entire entry except 3D611.y.	NS Column 1
RS applies to entire entry except 3D611.y.	RS Column 1
AT applies to entire entry.	AT Column 1
UN applies to entire entry except 3D611.y.	See § 746.1(b) for UN controls

License Exceptions

CIV: N/A
TSR: N/A
STA: 1. Paragraph (c)(2) of License Exception STA (§ 740.20(c)(2)) of the EAR may not be used for any ''software'' in 3D611. 2. License Exception STA is not eligible for software for the ''development,'' ''production,'' operation, installation, maintenance, repair, or overhaul of items enumerated in ECCN 3E611.b.

List of Items Controlled

Unit: $ value
Related Controls: ''Software'' directly related to articles enumerated in USML Category XI is subject to the control of USML paragraph XI(d).
Related Definitions: N/A
Items:

a. Software ''specially designed'' for the ''development,'' ''production,'' operation, or maintenance of commodities controlled by ECCN 3A611 (other than 3A611.y), 3B611.

b. through x. [RESERVED]

y. Specific ''software'' ''specially designed'' for the ''production,'' ''development,'' operation or maintenance of commodities enumerated in ECCNs 3A611.y.

6. In Supplement No. 1 to Part 774, between the entries for ECCNs 3E292 and 3E980, add new entry for ECCN 3E611 to read as follows:

3E611 Technology ''Required'' for Military Electronics, as Follows (See List of Items Controlled)

License Requirements

Reason for Control: NS, RS, AT, UN

Control(s)	*Country chart*
NS applies to entire entry except 3E611.y.	NS Column 1
RS applies to entire entry except 3E611.y.	RS Column 1
AT applies to entire entry.	AT Column 1
UN applies to entire entry except 3E611.y.	See § 746.1(b) for UN controls

License Exceptions

CIV: N/A

TSR: N/A

STA: 1. Paragraph (c)(2) of License Exception STA (§ 740.20(c)(2)) of the EAR may not be used for any technology in 3E611. 2. Except for ''build-to-print'' technology, License Exception STA is not eligible for technology enumerated in ECCN 3E611.b.

List of Items Controlled

Unit: $ value

Related Controls: Technical data directly related to articles enumerated in USML Category XI is subject to the control of USML paragraph XI(d).

Related Definitions: N/A

Items:

a. ''Technology'' (other than that described in 3E611.b or 3E611.y) not otherwise enumerated in this ECCN ''required'' for the ''development,'' ''production,'' operation, installation, maintenance, repair, or overhaul of commodities or software controlled by ECCN 3A611, 3B611 or 3D611.

b. ''Technology'' ''required'' for the ''development,'' ''production,'' operation, installation, maintenance, repair, or overhaul of

(1) Helix traveling wave tubes (TWTs);

(2) Transmit/receive or transmit modules;

(3) Microwave monolithic integrated circuits (MMIC); or

(4) Discrete radio frequency transistors.

c. through x. [RESERVED]

y. Specific ''technology'' ''required'' for the ''production,'' ''development,'' operation, installation, maintenance, repair or overhaul of commodities enumerated in ECCNs 3A611.y or 3D611.y.

7. In Supplement No. 1 to Part 774, amend ECCN 4A003 by revising the License Requirements section to read as follows:

4A003 ''Digital Computers'', ''Electronic Assemblies'', and Related Equipment Therefor, as Follows (See List of Items Controlled) and Specially Designed Components Therefor

License Requirements

Reason for Control: NS, MT, CC, AT, NP

Control(s)	*Country chart*
NS applies to 4A003.b and .c.	NS Column 1
NS applies to 4A003.e and .g.	NS Column 2
MT applies to 4A003.e when the parameters in 3A101.a.4 are met or exceeded.	MT Column 1
CC applies to ''digital computers'' for computerized finger-print equipment.	CC Column 1
AT applies to entire entry (refer to 4A994 for controls on ''digital computers'' with a APP > 0.0128 but ≤3.0 WT).	AT Column 1

NP applies, unless a License Exception is available. See § 742.3(b) of the EAR for information on applicable licensing review policies.

Note 1: *For all destinations, except those countries in Country Group E:1 of Supplement No. 1 to part 740 of the EAR, no license is required (NLR) for computers with an ''Adjusted Peak Performance'' (''APP'') not exceeding 3.0 Weighted TeraFLOPS (WT) and for ''electronic assemblies'' described in 4A003.c that are not capable of exceeding an ''Adjusted Peak Performance'' (''APP'') exceeding 3.0 Weighted TeraFLOPS (WT) in aggregation, except certain transfers as set forth in § 746.3 (Iraq).*

Note 2: *Special Post Shipment Verification reporting and recordkeeping requirements for exports of computers to destinations in Computer Tier 3 may be found in § 743.2 of the EAR.*

* * * * *

8. In Supplement No. 1 to Part 774, between the entries for ECCNs 4A102 and 4A980, add a new entry for ECCN 4A611 as follows:

4A611 Computers, and Parts, Components, Accessories, and Attachments ''Specially Designed'' Therefor, ''Specially Designed'' for Military Use That Are Not Enumerated in Any USML Category Are Controlled by ECCN 3A611

9. In Supplement No. 1 to Part 774, amend ECCN 5A001 by revising the Related Controls paragraph of the List of Items Controlled section, to read as follows:

5A001 Telecommunications Systems, Equipment, Components and Accessories, as Follows (See List of Items Controlled)

* * * * *

List of Items Controlled

* * * * *

Related Controls: 1. See USML Category XV for controls on telecommunications equipment defined in 5A001.a.1 and any other equipment used in satellites that are subject to the ITAR. See USML Category XI for controls on direction finding equipment defined in 5A001.e and any other military or intelligence electronic equipment subject to the ITAR. 2. See USML Category XI(a)(4)(iii) for controls on electronic attack and jamming equipment defined in 5A001.f and .h that are subject to the ITAR. 3. See also ECCNs 5A101, 5A980, and 5A991.

* * * * *

10. In Supplement No. 1 to Part 774, between the entries for ECCNs 5A101 and 5A980, add a new entry for ECCN 5A611 as follows:

5A611 Telecommunications Equipment, and Parts, Components, Accessories, and Attachments ''Specially Designed'' Therefor, ''Specially Designed'' for Military Use That Are Not Enumerated in Any USML Category Are Controlled by ECCN 3A611

11. In Supplement No. 1 to Part 774, between the entries for ECCNs 6A226 and 6A991, add a new entry for ECCN 6A611 as follows:

6A611 Radar, and Parts, Components, Accessories, and Attachments ''Specially Designed'' Therefor, ''Specially Designed'' for Military Use That Are Not Enumerated in Any USML Category or Other ECCN Are Controlled by ECCN 3A611.

12. In Supplement No. 1 to Part 774, ECCN 7A006, revise the Reasons for Control paragraph of the License Requirements section to read as follows:

7A006 Airborne Altimeters Operating at Frequencies Other Than 4.2 to 4.4 GHz Inclusive and Having Any of the Following (See List of Items Controlled).

License Requirements

Reason for Control: NS, MT, AT

Control(s)	*Country chart*
NS applies to entire entry.	NS Column 1
MT applies to commodities in this entry that meet or exceed the parameters of 7A106.	MT Column 1
AT applies to entire entry.	AT Column 1

* * * * *

13. In Supplement No. 1 to Part 774, ECCN 7D101, revise the heading to read as follows:

7D101 ''Software'' Specially Designed or Modified for the ''Use'' of Equipment Controlled for Missile Technology (MT) Reasons by 7A001 to 7A006, 7A101 to 7A107, 7A115, 7A116, 7A117,7B001, 7B002, 7B003, 7B101, 7B102, or 7B103.

* * * * *

14. In Supplement No. 1 to Part 774, between the entries for ECCNs 9A120 and 9A980, add a new entry for ECCN 9A620 to read as follows:

9A620 Cryogenic and ''Superconductive'' Equipment, as Follows (See List of Items Controlled).

Reason for Control: NS, RS, AT, UN

Control(s)	Country chart
NS applies to entire entry.	NS Column 1
RS applies to entire entry.	RS Column 1
AT applies to entire entry.	AT Column 1
UN applies to entire entry.	See § 746.1(b) for UN controls

License Exceptions

LVS: $1500
GBS: N/A
CIV: N/A
STA: Paragraph (c)(2) of License Exception STA (§ 740.20(c)(2)) of the EAR may not be used for any item in 9A620.

List of Items Controlled

Unit: End items in number; parts, component, accessories and attachments in $ value
Related Controls: Electronic items that are enumerated in USML Category XI or other USML categories, and technical data (including software) directly related thereto, are subject to the ITAR.
Related Definitions: N/A.
Items:

a. Equipment ''specially designed'' to be installed in a vehicle for military ground, marine, airborne, or space applications, and capable of operating while in motion and of producing or maintaining temperatures below 103 K (−170 °C).

Note to 9A620.a: ECCN 9A620.a includes mobile systems incorporating or employing accessories or components manufactured from non-metallic or non-electrical conductive materials such as plastics or epoxy-impregnated materials.

b. ''Superconductive'' electrical equipment (rotating machinery and transformers) ''specially designed'' to be installed in a vehicle for military ground, marine, airborne, or space applications, and capable of operating while in motion.

Note to 3A610.b: ECCN 9A620.b. does not control direct-current hybrid homopolar generators that have single-pole normal metal armatures which rotate in a magnetic field produced by superconducting windings, provided those windings are the only superconducting components in the generator.

c. through w. [Reserved]

x. ''Parts,'' ''components,'' ''accessories'' and ''attachments'' that are ''specially designed'' for a commodity controlled by ECCN 9A620.

15. In Supplement No. 1 to Part 774, between the entries for ECCNs 9B117 and 9B990, add a new entry for ECCN 9B620 to read as follows:

9B620 Test, Inspection, and Production Commodities for Cryogenic and ''Superconductive'' Equipment (See List of Items Controlled).

License Requirements

Reason for Control: NS, RS, AT, UN

Control(s)	Country chart
NS applies to entire entry.	NS Column 1
RS applies to entire entry.	RS Column 1
AT applies to entire entry.	AT Column 1
UN applies to entire entry.	See § 746.1(b) for UN controls

License Exceptions

LVS: $1500
GBS: N/A
CIV: N/A
STA: Paragraph (c)(2) of License Exception STA (§ 740.20(c)(2)) of the EAR may not be used for any item in 9B620.

List of Items Controlled

Unit: N/A
Related Controls: N/A
Related Definitions: N/A
Items: Test, inspection, and production end items and equipment ''specially designed'' for items controlled in ECCN 9A620.

16. In Supplement No. 1 to Part 774, between the entries for ECCNs 9D105 and 9D990, add a new entry for ECCN 9D620 to read as follows:

9D620 ''Software'' ''Specially Designed'' for Cryogenic and ''Superconductive'' Equipment, as Follows (See List of Items Controlled).

License Requirements

Reason for Control: NS, RS, AT, UN

Control(s)	Country chart
NS applies to entire entry.	NS Column 1
RS applies to entire entry.	RS Column 1
AT applies to entire entry.	AT Column 1
UN applies to entire entry.	See § 746.1(b) for UN controls

License Exceptions

CIV: N/A
TSR: N/A
STA: Paragraph (c)(2) of License Exception STA (§ 740.20(c)(2)) of the EAR may not be used for any ''software'' in 9D620.

List of Items Controlled

Unit: $ value
Related Controls: ''Software'' directly related to articles enumerated on USML are subject to the control of that USML category.
Related Definitions: N/A
Items: Software ''specially designed'' for the ''development,'' ''production,'' operation, or maintenance of commodities controlled by ECCNs 9A620 or 9B620.

17. In Supplement No. 1 to Part 774, between the entries for ECCNs 9E102 and 9E990, add a new entry for ECCN 9E620 to read as follows:

9E620 Technology ''Required'' for Cryogenic and ''Superconductive'' Equipment, as Follows (See List of Items Controlled).

License Requirements

Reason for Control: NS, RS, AT, UN

Control(s)	Country chart
NS applies to entire entry.	NS Column 1
RS applies to entire entry.	RS Column 1
AT applies to entire entry.	AT Column 1
UN applies to entire entry.	See § 746.1(b) for UN controls

License Exceptions

CIV: N/A
TSR: N/A
STA: Paragraph (c)(2) of License Exception STA (§ 740.20(c)(2)) of the EAR may not be used for any technology in 9E620.

List of Items Controlled

Unit: $ value
Related Controls: Technical data directly related to articles enumerated on USML are subject to the control of that USML category.
Related Definitions: N/A
Items: ''Technology'' ''required'' for the ''development,'' ''production,'' operation, installation, maintenance, repair, or overhaul of commodities or software controlled by ECCN 9A620, 9B620 or 9D620.

Dated: November 16, 2012.

Kevin J. Wolf,

Assistant Secretary of Commerce for Export Administration.

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 15

[Docket No. FDA–2012–N–1148]

FDA Actions Related to Nicotine Replacement Therapies and Smoking-Cessation Products; Report to Congress on Innovative Products and Treatments for Tobacco Dependence; Public Hearing; Request for Comments

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of public hearing; request for comments.

SUMMARY: The Food and Drug Administration (FDA) is announcing a 1-day public hearing to obtain input on certain questions related to the implementation of the Federal Food, Drug, and Cosmetic Act (the FD&C Act), as amended by the Family Smoking Prevention and Tobacco Control Act

(Tobacco Control Act). This public hearing is being held to obtain comments from the public on FDA consideration of applicable approval mechanisms and additional indications for nicotine replacement therapies (NRTs), and to request input on a report to Congress examining the regulation and development of innovative products and treatments for tobacco dependence.

DATES: The public hearing will be held on December 17, 2012, 8 a.m. to 5 p.m. Individuals who wish to present at the public hearing must register by December 6, 2012. Section III of this document provides attendance and registration information. Electronic or written comments will be accepted after the public hearing until January 2, 2013.

ADDRESSES: The public hearing will be held at FDA's White Oak Campus, 10903 New Hampshire Ave., Bldg. 31, rm. 1503, Silver Spring, MD 20993. Individuals who wish to present at the public hearing must register by December 6, 2012, and provide complete contact information, including name, title, affiliation, address, email, and phone number (see section III of this document for further information).

Submit electronic comments to *http://www.regulations.gov.* Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852. Identify comments with the docket number found in brackets in the heading of this document.

Transcripts of the public hearing will be available for review at the Division of Dockets Management and on the Internet at *http://www.regulations.gov* approximately 30 days after the public hearing (see section VI of this document).

A live Web cast of this public hearing may be seen at *https://collaboration.fda.gov/Section918* on the day of the public hearing. A video record of the public hearing will be available at the same Web address for 1 year.

FOR FURTHER INFORMATION CONTACT: Ayanna Augustus, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 22, Rm. 3219, Silver Spring, MD 20993, 301–796–3980, FAX: 301–796–2310, email: *Section918PublicMeeting@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing a 1-day public hearing to obtain input on certain questions related to the implementation of section 918 of the FD&C Act (21 U.S.C. 387r), as amended by the Tobacco Control Act (Pub. L. 111–31). Section 918 has two parts. Under Section 918(a), which is primarily focused on NRTs, the Secretary of the Department of Health and Human Services (the Secretary of HHS) is required to consider certain new approval mechanisms and additional indications for NRTs. Several NRTs, including nicotine-containing gums, patches, and lozenges, are already marketed for smoking cessation. Under section 918(b), a broader range of products is implicated. Section 918(b) requires that the Secretary of HHS, after consultation with recognized scientific, medical, and public health experts, submit a report to Congress examining how best to regulate, promote, and encourage the development of ''innovative products and treatments (including nicotine-based and non-nicotine-based products and treatments)'' to better achieve the following three goals: (1) Total abstinence from tobacco use, (2) reductions in consumption of tobacco, and (3) reductions in the harm associated with continued tobacco use. The purpose of this public hearing is to create a forum for interested stakeholders to provide input regarding FDA's fulfillment of the requirements set forth in section 918, including on the following issues, among others: (1) The use of fast-track and accelerated approval authorities for smoking-cessation products, including NRTs; (2) the potential for extended use of NRTs (beyond currently approved durations of use) for the treatment of tobacco dependence; (3) the potential for additional indications for NRTs, including for craving relief or relapse prevention; and (4) how best to regulate ''innovative products and treatments'' targeted at tobacco users in order to achieve abstinence from tobacco use, reductions in consumption of tobacco, and reductions in the harm associated with continued tobacco use. FDA will consider the information it obtains from the public hearing in its implementation of the requirements of section 918, including in drafting the report to Congress required by section 918(b).

II. Purpose and Scope of the Public Hearing

The purpose of this 21 CFR part 15 hearing is to receive information and comments from a broad group of stakeholders, including manufacturers, interested industry and professional organizations, the public health community, individuals affected by tobacco dependence, researchers, health care professionals, and the public, regarding implementation of section 918 of the FD&C Act. FDA is also consulting directly with other Federal agencies and third parties, as contemplated by section 918.

FDA is particularly interested in obtaining information and public comment on the issues listed in sections II.A and II.B of this document, although comments related to any issues regarding implementation of section 918 are welcome.

A. Section 918(a): FDA Actions Related to NRTs and Smoking-Cessation Products

Fast-Track Status for Smoking-Cessation Products, Including NRTs.

Section 918(a)(1) of the FD&C Act provides that the Secretary of HHS must, ''at the request of the applicant, consider designating products for smoking cessation, including nicotine replacement products as fast track research and approval products within the meaning of section 506'' of the FD&C Act (21 U.S.C. 356).

Accelerated approval and fast track designation are available under section 506 of the FD&C Act and FDA regulations,[1] and these provisions have been used on a case-by-case basis for drug candidates that are intended to treat ''a serious or life-threatening condition'' and that have the potential to fill an unmet medical need. The Food and Drug Administration Safety and Innovation Act (FDASIA), which was enacted in July 2012, amends section 506 to define ''breakthrough therapy'' [2] and provide that certain expedited review processes may be available to any drug candidate intended to treat a serious or life-threatening disease or condition, whether alone or in combination with other drugs, provided that the drug candidate has the potential to fill an unmet medical need.

FDA seeks comment on the following issues related to section 918(a)(1) of the FD&C Act:

1.1. How can FDA best use its authorities under section 506 of the FD&C Act, as amended by FDASIA (including the designation of products as ''fast track products'' and as ''breakthrough therapies''), to facilitate expedited review and accelerated

[1] See 21 CFR part 314, subpart H, and 21 CFR part 601, subpart E.

[2] A ''breakthrough therapy'' is a drug intended, alone or in combination with one or more other drugs, to treat a serious or life-threatening disease or condition, where ''preliminary clinical evidence indicates that the drug may demonstrate substantial improvement over existing therapies on 1 or more clinically significant endpoints, such as substantial treatment effects observed early in clinical development.'' 21 U.S.C. 356(a)(1).

approval for smoking-cessation products?

1.2. Under what circumstances should a smoking-cessation product candidate be considered to fill an unmet medical need under section 506, in light of the existing products for smoking cessation?

1.3. What kind of preliminary clinical evidence might support the designation of a smoking-cessation product candidate as a ''breakthrough therapy'' under section 506?

Extended use of NRTs for treatment of tobacco dependence. Section 918(a)(2) of the FD&C Act provides that the Secretary of HHS must ''consider approving the extended use of nicotine replacement products (such as nicotine patches, nicotine gum, and nicotine lozenges) for the treatment of tobacco dependence.'' The NRTs referenced in this provision are currently labeled as aids to smoking cessation with a course of treatment generally lasting 10–12 weeks, depending on the product. FDA's understanding is that ''extended use'' as used in section 918(a)(2) refers to use beyond that period of time, for the treatment of tobacco dependence.

On October 26 and 27, 2010, FDA held a public workshop entitled ''Risks and Benefits of Long-Term Use of Nicotine Replacement Therapy Products.'' The questions explored in that workshop overlap with the issues raised in section 918(a)(2) of the FD&C Act. Although FDA does not seek to duplicate the discussion held at the October 2010 workshop, FDA is interested in receiving any new or additional information that might be relevant to the extended use of NRTs for tobacco dependence.

FDA seeks comment on the following issues related to section 918(a)(2) of the FD&C Act:

2.1. What evidence is available to support the approval of NRTs for extended use to maintain abstinence in individuals who have quit?

2.2. What evidence is available to support the approval of NRTs for extended use to achieve cessation (quitting)?

2.3. With regard to both of the above indications, does the evidence implicate specific populations?

Additional indications for NRTs, such as craving relief and relapse prevention. Section 918(a)(3) of the FD&C Act provides that the Secretary of HHS must ''review and consider the evidence for additional indications for nicotine replacement products, such as for craving relief or relapse prevention.'' As noted previously, the NRTs referenced in this provision are currently indicated as aids to smoking cessation. In the studies that were carried out to demonstrate efficacy, the endpoint was smoking cessation. These products aid cessation by relieving withdrawal symptoms, including cravings, that smokers may experience in the process of quitting. However, no currently approved NRT is indicated for craving relief outside of the context of quitting; nor is any currently approved NRT indicated for relapse prevention.

FDA seeks comment on the following issues related to section 918(a)(3) of the FD&C Act:

3.1. If an additional indication is sought for an approved NRT in which craving relief itself is the endpoint of efficacy studies:

a. How can the concept of ''craving'' be adequately characterized to support a potential indication for craving relief?

b. Craving can occur in the context of acute withdrawal or long after a former smoker has quit (the latter may be described as ''provoked'' or ''cue-induced'' craving). Have both types of craving been adequately characterized to support a potential indication for craving relief?

c. Are there scientifically acceptable study designs for establishing efficacy for craving relief that use:

i. Established instruments to measure patient-reported outcomes?

ii. Analytical methods that address the degree of craving relief that should be considered clinically significant?

3.2. If an additional indication is sought for an approved NRT for relapse prevention:

a. How should ''relapse'' be defined and measured?

b. How should the population of individuals at risk of relapse be defined?

3.3. Are there other additional indications that might be sought for approved NRT products?

B. Report to Congress on How Best To Regulate Innovative Products and Treatments To Achieve Abstinence From Tobacco Use, Reductions in the Consumption of Tobacco, and Reductions in the Harm Associated With Continued Tobacco Use

Section 918(b) of the FD&C Act requires that the Secretary of HHS, after consultation with recognized scientific, medical, and public health experts, submit to Congress a report that examines how best to regulate, promote, and encourage the development of ''innovative products and treatments (including nicotine-based and non-nicotine-based products and treatments) to better achieve, in a manner that best protects and promotes the public health—(A) total abstinence from tobacco use; (B) reductions in consumption of tobacco; and (C) reductions in the harm associated with continued tobacco use.'' The report to Congress must include the recommendations of the Secretary of HHS on how FDA should coordinate and facilitate the exchange of information on these ''innovative products and treatments'' among relevant offices and Centers within FDA and within the National Institutes of Health, the Centers for Disease Control and Prevention, and other relevant Agencies such as the Substance Abuse and Mental Health Services Administration.

One question raised by section 918(b) of the FD&C Act is how FDA should regulate specific ''innovative products and treatments'' that make claims in the three categories identified. ''Abstinence from tobacco use'' may be understood to include non-initiation of tobacco use (never starting to use) as well as cessation of tobacco use (a user successfully quitting). Product claims in this category might therefore include claims to prevent or inhibit initiation as well as claims to bring about cessation.

A claim to reduce consumption of tobacco might, for example, suggest that the product would cause users to smoke fewer cigarettes or otherwise consume less tobacco. A claim to reduce the harms associated with continued tobacco use might, for example, suggest that the user could continue consuming tobacco as desired without experiencing one or more of the harmful effects of tobacco use.

Section 918(b) also raises a question as to how FDA and other HHS Agencies can implement regulation and policy with regard to the ''innovative products and treatments'' referenced in the statute to bring about the three effects identified—abstinence, reductions in consumption, and reductions in the harm associated with continued use—as broader outcomes, in a manner that best protects and promotes the public health.

FDA seeks comment on the following issues related to these provisions of section 918(b):

4.1. What kinds of innovative products and treatments designed to achieve any of the above three purposes—abstinence from tobacco use, reduction in tobacco consumption, and reduction in the harm associated with continued use—might be developed to meet the criteria for marketing under applicable legal authorities?

4.2. With regard to the ''abstinence'' category, what innovative products and treatments might be developed to better achieve either cessation or non-initiation? What are the established methods for measuring the prevention or inhibition of initiation?

4.3. With regard to innovative products and treatments for ''reduction in consumption of tobacco,''

a. How can the reduction best be measured?

b. If the reduction is associated with a certain goal or benefit:

i. What evidence is available to indicate that the reduction in consumption will bring about that goal or achieve that benefit?

ii. What degree and duration of reduction are necessary to achieve that goal or benefit?

4.4. With regard to innovative products and treatments for ''reduction in the harm associated with continued tobacco use'':

a. How should the ''harm'' be identified and measured?

b. Is there a range of harms that might be addressed, and if so, which are the most important to address?

4.5. With regard to innovative products and treatments making claims in any of the three categories identified in section 918(b), what barriers exist to development and marketing approval?

4.6 In regulating the innovative products and treatments referenced in section 918(b), how can FDA and other HHS Agencies act to ensure that the three effects mentioned in section 918(b)—total abstinence from tobacco use, reductions in consumption of tobacco, and reductions in the harm associated with continued tobacco use—are achieved as broader outcomes, in a manner that best protects and promotes the public health?

4.7. How can these broader outcomes be taken into account in FDA's premarket evaluation of new product candidates?

III. Attendance and Registration

The FDA Conference Center at the White Oak location is a Federal facility with security procedures and limited seating. Attendance is free and will be on a first-come, first-served basis. Individuals who wish to present at the public hearing must register by December 6, 2012, and provide complete contact information, including name, title, affiliation, address, email, and phone number. Those without email access may register by contacting Ayanna Augustus (see **FOR FURTHER INFORMATION CONTACT**). FDA has included questions for comment in section II of this document. You should identify the number of each question you wish to address in your presentation, so that FDA can consider that in organizing the presentations. Individuals and organizations with common interests should consolidate or coordinate their presentations and request time for a joint presentation. FDA will do its best to accommodate requests to speak and will determine the amount of time allotted for each oral presentation, and the approximate time that each oral presentation is scheduled to begin. FDA will notify registered presenters of their scheduled times, and make available an agenda at *http://www.fda.gov/Drugs/NewsEvents/ucm324938.htm* approximately 1 week prior to the public hearing. Once FDA notifies registered presenters of their scheduled times, presenters should submit to FDA an electronic copy of their presentation to *Section918PublicMeeting@fda.hhs.gov* by December 10, 2012.

If you need special accommodations because of a disability, please contact Ayanna Augustus (see **FOR FURTHER INFORMATION CONTACT**) at least 7 days before the meeting.

A live Web cast of this public hearing may be seen at *https://collaboration.fda.gov/Section918* on the day of the public hearing. A video record of the public hearing will be available at the same Web address for 1 year.

IV. Notice of Hearing Under 21 CFR Part 15

The Commissioner of Food and Drugs is announcing that the public hearing will be held in accordance with part 15 (21 CFR part 15). The hearing will be conducted by a presiding officer, who will be accompanied by senior management and technical experts from various offices within FDA.

Under § 15.30(f), the hearing is informal and the rules of evidence do not apply. No participant may interrupt the presentation of another participant. Only the presiding officer and panel members may question any person during or at the conclusion of each presentation. Public hearings under part 15 are subject to FDA's policy and procedures for electronic media coverage of FDA's public administrative proceedings (part 10 (21 CFR part 10, subpart C)). Under § 10.205, representatives of the electronic media may be permitted, subject to certain limitations, to videotape, film, or otherwise record FDA's public administrative proceedings, including presentations by participants. The hearing will be transcribed as stipulated in § 15.30(b) (see section VI of this document). To the extent that the conditions for the hearing, as described in this document, conflict with any provisions set out in part 15, this document acts as a waiver of those provisions as specified in § 15.30(h).

V. Request for Comments

Regardless of attendance at the public hearing, interested persons may submit either electronic or written comments to the Division of Dockets Management (see **ADDRESSES**). It is no longer necessary to send two copies of mailed comments. Identify comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

VI. Transcripts

Transcripts of the public hearing will be available for review at the Division of Dockets Management (see **ADDRESSES**) and on the Internet at *http://www.regulations.gov* approximately 30 days after the public hearing. A transcript will also be made available in either hard copy or on CD–ROM, upon submission of a Freedom of Information request. Written requests should be sent to the Division of Freedom of Information (ELEM–1029), Food and Drug Administration, 12420 Parklawn Dr., Element Bldg., Rockville, MD 20857.

Dated: November 21, 2012.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2012–28835 Filed 11–27–12; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF STATE

22 CFR Part 121

RIN 1400–AD25

[Public Notice: 8091]

Amendment to the International Traffic in Arms Regulations: Revision of U.S. Munitions List Category XI and Definition for ''Equipment''

AGENCY: Department of State.

ACTION: Proposed rule.

SUMMARY: As part of the President's Export Control Reform effort, the Department of State proposes to amend the International Traffic in Arms Regulations (ITAR) to revise Category XI (military electronics) of the U.S. Munitions List (USML) to describe more precisely the articles warranting control on the USML and to provide a definition for ''equipment.'' The revisions contained in this rule are part of the Department of State's retrospective plan under E.O. 13563 completed on August 17, 2011. The Department of State's full plan can be accessed at *http://www.state.gov/documents/organization/181028.pdf.*

DATES: The Department of State will accept comments on this proposed rule until January 28, 2013.

ADDRESSES: Interested parties may submit comments within 60 days of the date of publication by one of the following methods:

- *Email: DDTCResponseTeam@state.gov* with the subject line, ''ITAR Amendment—Category XI and 'Equipment.' ''
- *Internet:* At *www.regulations.gov,* search for this notice by using this rule's RIN (1400–AD25).

Comments received after that date will be considered if feasible, but consideration cannot be assured. Those submitting comments should not include any personally identifying information they do not desire to be made public or information for which a claim of confidentiality is asserted because those comments and/or transmittal emails will be made available for public inspection and copying after the close of the comment period via the Directorate of Defense Trade Controls Web site at *www.pmddtc.state.gov.* Parties who wish to comment anonymously may do so by submitting their comments via *www.regulations.gov,* leaving the fields that would identify the commenter blank and including no identifying information in the comment itself. Comments submitted via *www.regulations.gov* are immediately available for public inspection.

FOR FURTHER INFORMATION CONTACT: Ms. Candace M. J. Goforth, Director, Office of Defense Trade Controls Policy, Department of State, telephone (202) 663–2792; email *DDTCResponseTeam@state.gov.* ATTN: Regulatory Change, USML Category XI and ''Equipment.''

SUPPLEMENTARY INFORMATION: The Directorate of Defense Trade Controls (DDTC), U.S. Department of State, administers the International Traffic in Arms Regulations (ITAR) (22 CFR parts 120–130). The items subject to the jurisdiction of the ITAR, *i.e.,* ''defense articles,'' are identified on the ITAR's U.S. Munitions List (USML) (22 CFR 121.1). With few exceptions, items not subject to the export control jurisdiction of the ITAR are subject to the jurisdiction of the Export Administration Regulations (''EAR,'' 15 CFR parts 730–774, which includes the Commerce Control List (CCL) in Supplement No. 1 to Part 774), administered by the Bureau of Industry and Security (BIS), U.S. Department of Commerce. Both the ITAR and the EAR impose license requirements on exports and reexports. Items not subject to the ITAR or to the exclusive licensing jurisdiction of any other set of regulations are subject to the EAR.

Export Control Reform Update

The Departments of State and Commerce described in their respective Advanced Notices of Proposed Rulemaking (ANPRM) in December 2010 the Administration's plan to make the USML and the CCL positive, tiered, and aligned so that eventually they can be combined into a single control list (*see* ''Commerce Control List: Revising Descriptions of Items and Foreign Availability,'' 75 FR 76664 (December 9, 2010) and ''Revisions to the United States Munitions List,'' 75 FR 76935 (December 10, 2010)). The notices also called for the establishment of a ''bright line'' between the USML and the CCL to reduce government and industry uncertainty regarding export jurisdiction by clarifying whether particular items are subject to the jurisdiction of the ITAR or the EAR. While these remain the Administration's ultimate Export Control Reform objectives, their concurrent implementation would be problematic in the near term. In order to more quickly reach the national security objectives of greater interoperability with U.S. allies, enhancing the defense industrial base, and permitting the U.S. Government to focus its resources on controlling and monitoring the export and reexport of more significant items to destinations, end-uses, and end-users of greater concern than NATO allies and other multi-regime partners, the Administration has decided, as an interim step, to propose and implement revisions to both the USML and the CCL that are more positive, but not yet tiered.

Specifically, based in part on a review of the comments received in response to the December 2010 notices, the Administration has determined that fundamentally altering the structure of the USML by tiering and aligning it on a category-by-category basis would significantly disrupt the export control compliance systems and procedures of exporters and reexporters. For example, until the entire USML was revised and became final, some USML categories would follow the legacy numbering and control structures while the newly revised categories would follow a completely different numbering structure. In order to allow for the national security benefits to flow from re-aligning the jurisdictional status of defense articles that no longer warrant control on the USML on a category-by-category basis while minimizing the impact on exporters' internal control and jurisdictional and classification marking systems, the Administration plans to proceed with building positive lists now and afterward return to structural changes.

Revision of Category XI

This proposed rule revises USML Category XI, covering military electronics, to advance the national security objectives set forth above and to more accurately describe the articles within the category, in order to establish a ''bright line'' between the USML and the CCL for the control of these articles.

Paragraphs (a)(1) (covering underwater hardware, equipment, and systems), (a)(3) (covering radar systems and equipment), (a)(4) (covering electronic combat equipment), and (a)(5) (covering C^3, C^4, C^4ISR, and identification systems and equipment), are amended to more specifically enumerate the articles controlled therein.

Paragraph (a)(6), which currently controls military computers, is removed, and the articles controlled therein are transferred to the jurisdiction of the Department of Commerce under new ECCN 3A611.

Paragraph (a)(8) is added to cover unattended ground sensors.

Paragraph (a)(9) is added to cover electronic sensor systems for anti-submarine warfare or mine warfare.

Paragraph (a)(10) is added to cover electronic sensor systems for concealed weapons.

Paragraph (a)(11) is added to cover test sets ''specially designed'' and programmed for testing counter radio controlled improvised explosive device electronic warfare systems.

Paragraph (a)(12) is added to cover equipment to process or analyze Category XI defense articles.

Paragraph (b) (covering electronic systems or equipment for search, reconnaissance, collection, monitoring, direction finding, display, analysis, or production of information from the electromagnetic spectrum and electronic systems or equipment that counteracts electronic surveillance) is amended to provide consistency with Wassenaar Munitions List controls while retaining the same catch-all coverage of the current paragraph (b).

A significant aspect of this more positive, but not yet tiered, proposed USML category is that it does not contain controls on all generic parts, components, accessories, and attachments that are specifically designed or modified for a defense article, regardless of their significance to maintaining a military advantage for the United States. Rather, it contains, with

a few exceptions, a positive list of specific types of parts, components, accessories, and attachments that continue to warrant control on the USML. The exceptions pertain to those parts, components, accessories, and attachments identified as ''specially designed.''

Paragraph (d) is amended to remove reference to Significant Military Equipment.

Section 121.8 is amended by including a definition for ''equipment'' in new paragraph (h).

Finally, articles common to the Missile Technology Control Regime (MTCR) Annex and the USML are to be identified on the USML with the parenthetical ''(MT)'' at the end of each section containing such articles. A separate proposed rule will address the sections in the ITAR that include MTCR definitions.

Definition for Specially Designed

Although one of the goals of the export control reform initiative is to describe USML controls without using design intent criteria, a few of the controls in the proposed revision nonetheless use the term ''specially designed.'' It is, therefore, necessary for the Department to define the term. Three proposed definitions have been published to date. For the purpose of evaluation of this proposed rule, reviewers should use the definition provided by the Department of State in the June 19, 2012, proposed rule (77 FR 36428).

Request for Comments

As the U.S. Government works through the proposed revisions to the USML, some solutions have been adopted that were determined to be the best of available options. With the thought that multiple perspectives would be beneficial to the USML revision process, the Department welcomes the assistance of users of the lists and requests input on the following:

(1) A key goal of this rulemaking is to ensure the USML and the CCL together control all the items that meet Wassenaar Arrangement commitments embodied in Munitions List Category 11 (WA–ML11). To that end, the public is asked to identify any potential lack of coverage brought about by the proposed rules for Category XI contained in this notice and the new Category 3 ECCNs published separately by the Department of Commerce when reviewed together.

(2) The key goal of this rulemaking is to establish a ''bright line'' between the USML and the CCL for the control of these materials. The public is asked to provide specific examples of military electronics whose jurisdiction would be in doubt based on this revision.

(3) The current USML Category XI(c) does not control electronic parts, components, accessories, and attachments ''in normal commercial use.'' Although the proposed revisions to the USML do not preclude the possibility that electronic and other items in normal commercial use would or should be ITAR-controlled because, *e.g.,* they provide the United States with a critical military or intelligence advantage, the U.S. Government does not want to inadvertently control items on the ITAR that are in normal commercial use. The public is thus asked to provide specific examples of electronics, if any, that would be controlled by the revised Category XI that are now in normal commercial use.

Regulatory Analysis and Notices

Administrative Procedure Act

The Department of State is of the opinion that controlling the import and export of defense articles and services is a foreign affairs function of the United States Government and that rules implementing this function are exempt from sections 553 (rulemaking) and 554 (adjudications) of the Administrative Procedure Act (APA). Although the Department is of the opinion that this rule is exempt from the rulemaking provisions of the APA, the Department is publishing this rule with a 60-day provision for public comment and without prejudice to its determination that controlling the import and export of defense services is a foreign affairs function. As noted above, and also without prejudice to the Department position that this rulemaking is not subject to the APA, the Department previously published a related Advance Notice of Proposed Rulemaking (RIN 1400–AC78) on December 10, 2010 (75 FR 76935), and accepted comments for 60 days.

Regulatory Flexibility Act

Since the Department is of the opinion that this rule is exempt from the rulemaking provisions of 5 U.S.C. 553, it does not require analysis under the Regulatory Flexibility Act.

Unfunded Mandates Reform Act of 1995

This proposed amendment does not involve a mandate that will result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any year and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This proposed amendment has been found not to be a major rule within the meaning of the Small Business Regulatory Enforcement Fairness Act of 1996.

Executive Orders 12372 and 13132

This proposed amendment will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this proposed amendment does not have sufficient federalism implications to require consultations or warrant the preparation of a federalism summary impact statement. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this proposed amendment.

Executive Orders 12866 and 13563

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributed impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated a ''significant regulatory action,'' although not economically significant, under section 3(f) of Executive Order 12866. Accordingly, the rule has been reviewed by the Office of Management and Budget (OMB).

Executive Order 12988

The Department of State has reviewed the proposed amendment in light of sections 3(a) and 3(b)(2) of Executive Order 12988 to eliminate ambiguity, minimize litigation, establish clear legal standards, and reduce burden.

Executive Order 13175

The Department of State has determined that this rulemaking will not have tribal implications, will not impose substantial direct compliance costs on Indian tribal governments, and

will not preempt tribal law. Accordingly, Executive Order 13175 does not apply to this rulemaking.

Paperwork Reduction Act

Notwithstanding any other provision of law, no person is required to respond to, nor is subject to a penalty for failure to comply with, a collection of information, subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA), unless that collection of information displays a currently valid OMB control number. This proposed rule would affect the following approved collections: (1) Statement of Registration, DS–2032, OMB No. 1405–0002; (2) Application/License for Permanent Export of Unclassified Defense Articles and Related Unclassified Technical Data, DSP–5, OMB No. 1405–0003; (3) Application/License for Temporary Import of Unclassified Defense Articles, DSP–61, OMB No. 1405–0013; (4) Nontransfer and Use Certificate, DSP–83, OMB No. 1405–0021; (5) Application/License for Permanent/Temporary Export or Temporary Import of Classified Defense Articles and Classified Technical Data, DSP–85, OMB No. 1405–0022; (6) Application/License for Temporary Export of Unclassified Defense Articles, DSP–73, OMB No. 1405–0023; (7) Statement of Political Contributions, Fees, or Commissions in Connection with the Sale of Defense Articles or Services, OMB No. 1405–0025; (8) Authority to Export Defense Articles and Services Sold Under the Foreign Military Sales (FMS) Program, DSP–94, OMB No. 1405–0051; (9) Application for Amendment to License for Export or Import of Classified or Unclassified Defense Articles and Related Technical Data, DSP–6, –62, –74, –119, OMB No. 1405–0092; (10) Request for Approval of Manufacturing License Agreements, Technical Assistance Agreements, and Other Agreements, DSP–5, OMB No. 1405–0093; (11) Maintenance of Records by Registrants, OMB No. 1405–0111; (12) Annual Brokering Report, DS–4142, OMB No. 1405–0141; (13) Brokering Prior Approval (License), DS–4143, OMB No. 1405–0142; (14) Projected Sale of Major Weapons in Support of Section 25(a)(1) of the Arms Export Control Act, DS–4048, OMB No. 1405–0156; (15) Export Declaration of Defense Technical Data or Services, DS–4071, OMB No. 1405–0157; (16) Request for Commodity Jurisdiction Determination, DS–4076, OMB No. 1405–0163; (17) Request to Change End-User, End-Use, and/or Destination of Hardware, DS–6004, OMB No. 1405–0173; (18) Request for Advisory Opinion, DS–6001, OMB No. 1405–0174; (19) Voluntary Disclosure, OMB No. 1405–0179; and (20) Technology Security/Clearance Plans, Screening Records, and Non-Disclosure Agreements Pursuant to 22 CFR 126.18, OMB No. 1405–0195. The Department of State believes there will be minimal changes to these collections. The Department of State believes the combined effect of all rules to be published moving commodities from the USML to the EAR as part of the Administration's Export Control Reform would decrease the number of license applications by approximately 30,000 annually. The Department of State is looking for comments on the potential reduction in burden.

List of Subjects in Part 121

Arms and munitions, Exports.

Accordingly, for the reasons set forth above, Title 22, Chapter I, Subchapter M, part 121 is proposed to be amended as follows:

PART 121—THE UNITED STATES MUNITIONS LIST

1. The authority citation for part 121 continues to read as follows:

Authority: Secs. 2, 38, and 71, Pub. L. 90–629, 90 Stat. 744 (22 U.S.C. 2752, 2778, 2797); E.O. 11958, 42 FR 4311; 3 CFR, 1977 Comp. p. 79; 22 U.S.C. 2651a; Pub. L. 105–261, 112 Stat. 1920.

2. Section 121.1 is amended by revising U.S. Munitions List Category XI to read as follows:

§ 121.1 General. The United States Munitions List.

* * * * *

Category XI—Military Electronics

(a) Electronic equipment not included in Category XII of the U.S. Munitions list, as follows:

(1) Underwater hardware, equipment, or systems, as follows:

(i) Active or passive acoustic array sensing systems or equipment that survey or detect, and track, localize (*i.e.,* determine range and bearing), classify, or identify surface vessels, submarines, other undersea vehicles, torpedoes, or mines having any of the following:

(A) Multi-aspect capability;

(B) Operating frequency less than 20 kHz;

(C) Bandwidth greater than 10 kHz; or

(D) Capable of real-time processing;

(ii) Underwater single acoustic sensor system that distinguishes tonals and locates the origin of the sound;

(iii) Non-acoustic systems that survey or detect, and track, localize, classify, or identify surface vessels, submarines, other undersea vehicles, torpedoes, or mines;

Note to paragraph (a)(1)(iii): Equipment controlled in CCL ECCN 5A001.b.1 is not included.

(iv) Acoustic modems, networks, and communications equipment with adaptive compensation or employing Low Probability of Intercept (LPI);

Note 1 to paragraph (a)(1)(iv): Adaptive compensation is the capability of an underwater modem to assess the water conditions to select the best algorithm to receive and transmit data.

Note 2 to paragraph (a)(1)(iv): The term ''Low Probability of Intercept'' used in this paragraph and elsewhere in this category is defined as a class of measures that disguise, delay, or prevent the interception of acoustic or electromagnetic signals. LPI techniques can involve permutations of power management, energy management, frequency variability, out-of-receiver-frequency band, low-side lobe antenna, complex waveforms, and complex scanning. LPI is also referred to as Low Probability of Intercept, Low Probability of Detection, and Low Probability of Identification.

(v) LF/VLF electronic modems, routers, interfaces and communications equipment ''specially designed'' for submarine communications; or

(vi) Autonomous processing/control systems and equipment that enable cooperative sensing and engagement by fixed (bottom mounted/seabed) or mobile Autonomous Underwater Vehicles (AUVs);

(2) Underwater acoustic countermeasures or counter-countermeasures systems or equipment;

(3) Radar systems and equipment, as follows:

(i) Airborne radar that track targets;

(ii) Synthetic aperture radar (SAR) incorporating image resolution less than (better than) 0.3 meter, or incorporating Coherent Change Detection (CCD) with geo-registration accuracy less than (better than) 0.3 meter;

(iii) Inverse Synthetic Aperture Radar (ISAR);

(iv) Radar that geo-locates with a target location error 50 (TLE50) less than or equal to 10 meters;

(v) Any ocean surface surveillance radar with either a product of transmit peak power times antenna gain divided by minimum detectable signal of >165 dB, or a capability to distinguish a target of <10 dBsm from sea clutter with a false alarm rate of 10^{-6} or better in sea state 3 or higher, or both;

(vi) Sea surveillance/navigation radar with free space detection of 1 square meter radar cross section (RCS) target at 20 nautical miles (nmi) or greater range;

(vii) Land or perimeter surveillance radar with free space detection of 1 square meter RCS target at 5.4 nmi or greater range and has a revisit rate of faster than once every sixty seconds;

(viii) Air surveillance radar with free space detection of 1 sq m RCS target at 85 nmi or greater range or free space detection of 1 sq m RCS target at an altitude of 65,000 feet and an elevation angle greater than 20 degrees;

(ix) Air surveillance radar with multiple elevation beams, phase or amplitude monopulse estimation, or 3D height-finding;

(x) Air surveillance radar with a beam solid angle less than or equal to 16 degrees^2 that performs free space tracking of 1 sq m RCS target at a range greater or equal to 25 nmi with revisit rate greater or equal to ⅓ hertz;

(xi) Instrumentation radar for anechoic test facility or outdoor range to track targets, or provide measure of RCS of static target less than or equal to −10dBsm, or RCS of dynamic target;

(xii) Radar incorporating pulsed operation with electronics steering of transmit beam in elevation and azimuth;

(xiii) Radar with mode(s) for ballistic tracking or ballistic extrapolation to source of launch or impact point of articles controlled in USML Categories III or IV;

(xiv) Active protection radar and missile warning radar with mode(s) implemented for detection of incoming munitions;

(xv) Over the horizon high frequency sky-wave (ionosphere) radar;

(xvi) Radar that detects a moving object through a physical obstruction at distance greater than 0.2 meters from the obstruction;

(xvii) Radar having moving target indicator (MTI) or pulse-Doppler processing where any single Doppler filter provides a normalized clutter attenuation of greater than 50dB;

Note to paragraph (a)(3)(xvii): ''Normalized clutter attenuation'' is defined as the reduction in the power level of received distributed clutter when normalized to the thermal noise level.

(xviii) Radar having electronic protection (EP) or electronic counter-countermeasures (ECCM) other than manual gain control, automatic gain control, radio frequency selection, constant false alarm rate, and pulse repetition interval jitter;

(xix) Radar employing electronic attack (EA) mode(s) using the radar transmitter and antenna;

(xx) Radar employing electronic support (ES) mode(s) (*i.e.,* the ability to use a radar system for ES purposes in one or more of the following: As a high-gain receiver, as a wide-bandwidth receiver, as a multi-beam receiver, or as part of a multi-point system);

(xxi) Radar employing non-cooperative target recognition (NCTR) (*i.e.,* the ability to recognize a specific platform type without cooperative action of the target platform);

(xxii) Radar employing automatic target recognition (ATR) (*i.e.,* recognition of generic target type using structural features of the target) with system resolution better than (less than) 0.3 meters;

(xxiii) Radar that sends interceptor guidance commands or provides illumination keyed to an interceptor seeker;

(xxiv) Radar employing waveform generation for low probability of intercept (LPI) other than frequency modulated continuous wave (FMCW) with linear ramp modulation;

(xxv) Radar that sends and receives communications;

(xxvi) Radar that tracks or discriminates ballistic missile warhead from debris or countermeasures;

(xxvii) Bi-static/multi-static radar that exploits greater than 125 kHz bandwidth and is lower than 2 GHz center frequency to passively detect or track using RF transmissions (*e.g.,* commercial radio or television stations);

(xxviii) Radar target generators, projectors, or simulators ''specially designed'' for radars controlled by this category; or

(xxix) Radar and laser radar systems ''specially designed'' for defense articles in (a)(1) of Category IV and (a)(5) and (a)(6) of Category VIII (MT);

Note to paragraph (a)(3): This category does not control secondary surveillance radar (SSR) or precision approach radar (PAR) equipment conforming to ICAO standards and employing electronically steerable linear (1-dimensional) arrays or mechanically positioned passive antennae.

(4) Electronic combat equipment, as follows:

(i) Electronic support (ES) systems and equipment that search for, intercept, and identify, or locate sources of intentional or unintentional electromagnetic energy for the purpose of immediate threat detection, recognition, targeting, planning, or conduct of future operations;

Note to paragraph (a)(4)(i): Electronic Support functions consist of tactical situational awareness, automatic cueing, targeting, electronic order of battle planning, electronic intelligence (ELINT), communication intelligence (COMINT), signals intelligence (SIGINT).

(ii) Systems and equipment that detect and automatically discriminate acoustic energy emanating from weapons fire (*e.g.,* gunfire, artillery, rocket propelled grenades, or other projectiles), determining location or direction of weapons fire in less than two seconds from receipt of event signal, and able to operate on-the-move (*e.g.,* operating on personnel, land vehicles, sea vessels, or aircraft while in motion); or

(iii) Systems and equipment ''specially designed'' to introduce extraneous or erroneous signals into radar, infrared based seekers, electro-optic based seekers, radio communication receivers, navigation receivers, or that otherwise hinder the reception, operation, or effectiveness of adversary electronics (*e.g.,* active or passive electronic attack, electronic countermeasure, electronic counter-countermeasure equipment, jamming, and counter jamming equipment);

(5) Command, control, and communications (C^3), command, control, communications, and computers (C^4), command, control, communications, computers, intelligence, surveillance, and reconnaissance (C^4ISR), and identification systems or equipment, as follows:

(i) C^3, C^4, and C^4ISR systems ''specially designed'' to integrate, incorporate, network, or employ defense articles controlled in this subchapter;

(ii) Identification friend or foe (IFF) systems or equipment incorporating U.S. government Modes 4 or 5;

(iii) Systems or equipment that implement active or passive electronic counter-countermeasures (ECCM) used to counter acts of communication disruption (*e.g.,* radios that incorporate HAVE QUICK I/II, SINCGARS, SATURN);

(iv) Systems or equipment implementing techniques to suppress compromising emanations of information bearing signals ''specially designed'' or certified to meet U.S. Government NSTISSAM TEMPEST 1–92 standards or CNSSAM TEMPEST 01–02; or

(v) Systems or equipment that transmit voice or data signals ''specially designed'' to elude electromagnetic detection;

(6) [Reserved]

(7) Developmental electronic devices, systems, or equipment funded by the Department of Defense;

Note 1 to paragraph (a)(7): Paragraph XI(a)(7) does not control developmental electronic devices, systems, or equipment (a) determined to be subject to the EAR via a commodity jurisdiction determination (*see* § 120.4 of this subchapter) or (b) identified in the relevant Department of Defense contract as being developed for both civil and military applications.

Note 2 to paragraph (a)(7): Note 1 does not apply to defense articles enumerated on the

USML, whether in production or development.

(8) Unattended ground sensor (UGS) systems or equipment having all of the following:

(i) Automatic target detection;

(ii) Automatic target tracking, classification, recognition, or identification;

(iii) Self-forming or self-healing networks; and

(iv) Self-localization for geo-locating targets;

(9) Electronic sensor systems or equipment for non-acoustic anti-submarine warfare (ASW) or mine warfare (*e.g.,* magnetic anomaly detectors (MAD), electric-field, and electromagnetic induction);

(10) Electronic sensor systems or equipment for detection of concealed weapons, having a standoff detection range of greater than 45 meters for personnel or detection of vehicle-carried weapons;

(11) Test sets ''specially designed'' and programmed for testing counter radio controlled improvised explosive device (C–RCIED) electronic warfare (CREW) systems;

(12) Equipment ''specially designed'' to process or analyze signals from defense articles controlled by this category; or

(13) Direction finding equipment for determining bearings to specific electromagnetic sources or terrain characteristics ''specially designed'' for defense articles in paragraph (a)(1) of Category IV and paragraphs (a)(5) and (a)(6) of Category VIII (MT).

(b) Electronic systems or equipment ''specially designed'' for the collection, surveillance, monitoring, or exploitation of the electromagnetic spectrum (regardless of transmission medium), for intelligence or security purposes or for counteracting such activities. This includes:

(1) Non-cooperative direction finding systems that have an angle of arrival (AOA) accuracy better than (less than) two degrees RMS and are not ''specially designed'' for navigation;

(2) Such systems or equipment that use burst techniques (*e.g.,* time compression techniques);

(3) Systems and equipment ''specially designed'' for measurement and signature intelligence (MASINT);

(4) Technical surveillance counter-measure (TSCM) or electronic surveillance equipment and counter electronic surveillance equipment (including spectrum analyzers) for the RF/microwave spectrum that:

(i) Sweep or scan speed exceeding 250 MHz per second;

(ii) Have instantaneous bandwidth exceeding 110 MHz;

(iii) Have built-in signal analysis capability;

(iv) Have a volume of less than 1 cubic foot;

(v) Record time-domain or frequency-domain digital signals other than single trace spectral snapshots; and

(vi) Display time-vs-frequency domain (*e.g.,* waterfall or rising raster).

(c) Parts, components, accessories, attachments, and associated equipment, as follows:

(1) Application specific integrated circuits (ASIC) for which the functionality is ''specially designed'' for defense articles in this subchapter;

(2) Printed circuit boards or patterned multichip modules for which the layout is ''specially designed'' for defense articles in this subchapter;

(3) Transmit/receive modules or transmit modules that have any two perpendicular sides, with either length d (in cm) equal to or less than 15 divided by the lowest operating frequency in GHz [$d \leq 15cm*GHz/f_{GHz}$], that incorporate a MMIC or discrete RF power transistor and a phase shifter or phasers;

(4) High-energy storage capacitors with a repetition rate of 6 discharges or more per minute that have any of the following:

(i) Volumetric energy density greater than or equal to 1.3 J/cc;

(ii) Mass energy density greater than or equal to 1.1 kJ/kg; or

(iii) Full energy life greater than or equal to 10,000 discharges;

(5) Radio frequency circulators of any dimension equal to or less than one quarter (¼) wavelength of the highest operating frequency and isolation greater than 30dB;

(6) Polarimeter that detects and measures polarization of radio frequency signals within a single pulse;

(7) Digital radio frequency memory (DRFM) with RF instantaneous input bandwidth greater than 400 MHz, and 4 bit or higher resolution and ''specially designed'' parts and components therefor;

(8) Vacuum electronic devices, as follows:

(i) Multiple electron beam or sheet electron beam devices rated for operation at frequencies of 16 GHz or above, and with a saturated power output greater than 10,000 W (70 dBm) or a maximum average power output greater than 3,000 W (65 dBm); or

(ii) Cross-field amplifiers with a gain of 15 dB to 17 dB or a duty factor greater than 5%;

(9) Antenna, and ''specially designed'' parts and components therefor, that:

(i) Electronically steer angular beams and nulls with four or more elements;

(ii) Form adaptive null attenuation greater than 35 dB with convergence time less than 1 second;

(iii) Detect signals across multiple RF bands with matched left hand and right hand spiral antenna elements for determination of signal polarization; or

(iv) Determine signal angle of arrival less than two degrees (*e.g.,* interferometer antenna);

(10) Radomes or electromagnetic antenna windows that:

(i) Incorporate radio frequency selective surfaces (MT);

(ii) Operate in multiple or more non-adjacent radar bands (MT);

(iii) Incorporate a structure that is ''specially designed'' to provide ballistic protection from bullets, shrapnel, or blast (MT);

(iv) Have a melting point greater than 1,300 °C and maintain a dielectric constant less than 6 at temperatures greater than 500 °C (MT);

(v) Are manufactured from ceramic materials with a dielectric constant less than 6 at any frequency from 100 MHz to 100 GHz (MT);

(vi) Maintain structural integrity at stagnation pressures greater than 6,000 pounds per square foot (MT);

(vii) Withstand combined thermal shock greater than 4.184×10^6 J/m^2 accompanied by a peak overpressure of greater than 50 kPa (MT); or

(viii) Are configured to blend with the external geometry of end-items controlled in Category IV (MT);

(11) Underwater sensors (acoustic vector sensors, hydrophones, or transducers) or projectors ''specially designed'' for systems controlled by paragraphs (a)(1) and XI(a)(2) of this category, having any of the following:

(i) A transmitting frequency below 10 kHz;

(ii) Sound pressure level exceeding 224 dB (reference 1 μPa at 1 m) for equipment with an operating frequency in the band from 10 kHz to 24 kHz inclusive;

(iii) Sound pressure level exceeding 235 dB (reference 1 μPa at 1 m) for equipment with an operating frequency in the band between 24 kHz and 30 kHz;

(iv) Forming beams of less than 1° on any axis and having an operating frequency of less than 100 kHz;

(v) Designed to operate with an unambiguous display range exceeding 5,120 m; or

(vi) Designed to withstand pressure during normal operation at depths exceeding 1,000 m and having transducers with any of the following:

(A) Dynamic compensation for pressure; or

(B) Incorporating other than lead zirconate titanate as the transduction element;

(12) Parts or components containing piezoelectric materials which are ''specially designed'' for underwater hardware, equipment, or systems controlled by paragraph (c)(11) of this category;

(13) Tuners having an instantaneous bandwidth of 30 MHz or greater and a tuning speed of 300 microseconds or less to within 10 KHz of desired frequency;

(14) Electronic assemblies and components ''specially designed'' for missiles, rockets, or UAVs capable of achieving a range of at least 300 km and capable of operation at temperatures in excess of 125 °C (MT);

(15) ''Specially designed'' hybrid (combined analogue/digital) computers for modeling, simulation, or design integration of systems enumerated in paragraphs (a)(1), (d)(1), (d)(2), (h)(1), (h)(2), (h)(4), (h)(8), and (h)(9) of Category IV or paragraphs (a)(5) and (a)(6) of Category VIII (MT);

(16) Parts, components, or accessories ''specially designed'' to modify or customize the properties (*e.g.,* operating frequencies, algorithms, waveforms, CODECs, or modulation/demodulation schemes) of a radio or information assurance/information security article controlled in this subchapter beyond what is specified in the public domain or the published product specifications; or

(17) Any part, component, accessory, attachment, equipment, or system that (MT for those articles designated as such):

(i) Is classified;

(ii) Contains classified software; or

(iii) Is being developed using classified information.

(iv) *Classified* means classified pursuant to Executive Order 13526, or predecessor order, and a security classification guide developed pursuant thereto or equivalent, or to the corresponding classification rules of another government or intergovernmental organization.

(d) Technical data (*see* § 120.10 of this subchapter) and defense services (*see* § 120.9 of this subchapter) directly related to the defense articles enumerated in paragraphs (a) through (c) of this category and classified technical data directly related to items controlled in CCL ECCN 9E620 and defense services using the classified technical data. (*See* § 125.4 of this subchapter for exemptions.) (MT for technical data and defense services related to articles designated as such.)

* * * * *

3. Section 121.8 is amended by revising the section heading and adding paragraph (h) to read as follows:

§ 121.8 End-items, components, accessories, attachments, parts, firmware, software, systems, and equipment.

* * * * *

(h) *Equipment* is a combination of parts, components, accessories, attachments, firmware, or software that operate together to perform a specialized function of an end-item or a system.

Dated: November 19, 2012.

Andrew J. Shapiro,

Assistant Secretary, Bureau of Political-Military Affairs, Department of State.

[FR Doc. 2012–28477 Filed 11–23–12; 11:15 am]

BILLING CODE 4710–25–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

25 CFR Part 226

Osage Negotiated Rulemaking Committee

AGENCY: Bureau of Indian Affairs, Interior

ACTION: Notice of public meeting cancellation

SUMMARY: In accordance with the requirements of the Federal Advisory Committee Act, 5 U.S.C. Appendix 2, the U.S. Department of the Interior, Bureau of Indian Affairs, Osage Negotiated Rulemaking Committee has cancelled the December 13–14, 2012 meeting.

DATES: The meetings were originally scheduled for Thursday, December 13, 2012, and Friday, December 14, 2012, from 9 a.m. to 6 p.m. at the Wah Zha Zhi Cultural Center, 1449 W. Main, Pawhuska, Oklahoma 74056. A new meeting date and location will be announced later.

FOR FURTHER INFORMATION CONTACT: Mr. Eddie Streater, Designated Federal Officer, Bureau of Indian Affairs, Wewoka Agency, P.O. Box 1540, Seminole, OK 74818; telephone (405) 257–6250; fax (405) 257–3875; or email *osageregneg@bia.gov.* Additional Committee information can be found at: *http://www.bia.gov/osageregneg.*

SUPPLEMENTARY INFORMATION: On October 14, 2011, the United States and the Osage Nation (formerly known as the Osage Tribe) signed a Settlement Agreement to resolve litigation regarding alleged mismanagement of the Osage Nation's oil and gas mineral estate, among other claims. As part of the Settlement Agreement, the parties agreed that it would be mutually beneficial ''to address means of improving the trust management of the Osage Mineral Estate, the Osage Tribal Trust Account, and Other Osage Accounts.'' Settlement Agreement, Paragraph 1.i. The parties agreed that a review and revision of the existing regulations is warranted to better assist the Bureau of Indian Affairs (BIA) in managing the Osage Mineral Estate. The parties agreed to engage in a negotiated rulemaking for this purpose. Settlement Agreement, Paragraph 9.b. After the Committee submits its report, BIA will develop a proposed rule to be published in the **Federal Register**.

Dated: November 21, 2012.

Michael S. Black,

Director, Bureau of Indian Affairs.

[FR Doc. 2012–28806 Filed 11–27–12; 8:45 am]

BILLING CODE 4310–02–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2012–0938]

RIN 1625–AA87

Security Zone, Potomac and Anacostia Rivers; Washington, DC

AGENCY: Coast Guard, DHS.

ACTION: Supplemental notice of proposed rulemaking.

SUMMARY: This action is a supplemental notice of proposed rulemaking (SNPRM) to the Coast Guard's October 24, 2012, notice of proposed rulemaking (NPRM) that proposed to establish a security zone during activities associated with the Presidential Inauguration in Washington, DC from January 15, 2013 through January 24, 2013 (77 FR 64943). This supplemental proposal extends the southern boundary of the proposed security zone. This rule prohibits vessels and people from entering the security zone and requires vessels and persons in the security zone to depart the security zone, unless specifically exempt under the provisions in this rule or granted specific permission from the Coast Guard Captain of the Port Baltimore. This action is intended to temporarily restrict vessel traffic in portions of the Potomac and Anacostia Rivers during the event.

DATES: Comments and related material must be received by the Coast Guard on or before December 28, 2012.

ADDRESSES: You may submit comments identified by docket number using any one of the following methods:

(1) *Federal eRulemaking Portal: http://www.regulations.gov.*

(2) *Fax:* 202–493–2251.

(3) *Mail or Delivery:* Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590–0001. Deliveries accepted between 9 a.m. and 5 p.m., Monday through Friday, except federal holidays. The telephone number is 202–366–9329.

See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section below for further instructions on submitting comments. To avoid duplication, please use only one of these three methods.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Mr. Ronald L. Houck, Sector Baltimore, Waterways Management Division, U.S. Coast Guard; telephone (410) 576–2674, email *Ronald.L.Houck@uscg.mil.* If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION:

Table of Acronyms

DHS Department of Homeland Security
FR **Federal Register**
NPRM Notice of Proposed Rulemaking

A. Public Participation and Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related materials. All comments received will be posted without change to *http://www.regulations.gov* and will include any personal information you have provided.

1. Submitting Comments

If you submit a comment, please include the docket number for this rulemaking (USCG–2012–0938), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online at *http://www.regulations.gov,* or by fax, mail, or hand delivery, but please use only one of these means. If you submit a comment online, it will be considered received by the Coast Guard when you successfully transmit the comment. If you fax, hand deliver, or mail your comment, it will be considered as having been received by the Coast Guard when it is received at the Docket Management Facility. We recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov,* type the docket number [USCG–2012–0938] in the ''SEARCH'' box and click ''SEARCH.'' Click on ''Submit a Comment'' on the line associated with this rulemaking.

If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period and may change the rule based on your comments.

2. Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* type the docket number (USCG–2012–0938) in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rulemaking. You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

3. Privacy Act

Anyone can search the electronic form of comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review a Privacy Act notice regarding our public dockets in the January 17, 2008, issue of the **Federal Register** (73 FR 3316).

4. Public Meeting

We do not now plan to hold a public meeting. But you may submit a request for one, using one of the methods specified under **ADDRESSES**. Please explain why you believe a public meeting would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

B. Regulatory History and Information

On October 24, 2012, we published a notice of proposed rulemaking (NPRM) entitled ''Security Zone, Potomac and Anacostia Rivers; Washington, DC'' in the **Federal Register** (77 FR 64943). The NPRM stated that from January 15, 2013 through January 24, 2013, activities associated with the Presidential Inauguration will occur in Washington, DC. Activities associated with the Presidential Inauguration include several Inaugural ceremonies, balls, parades and receptions. During these activities, a gathering of high-ranking United States officials and the public-at-large is expected to take place. Due to the need for vessel control during the event, the Coast Guard will temporarily restrict vessel traffic in portions of the Potomac and Anacostia Rivers to safeguard life and property on the navigable waters before, during, and after activities associated with the Presidential Inauguration. After the NPRM was published in the **Federal Register**, however, the Coast Guard determined that the boundary of the proposed security zone on the south between the Virginia shoreline and the District of Columbia shoreline along latitude 38°51′00″ N needed to be relocated farther downstream to and along latitude 38°50′00″ N. The additional area is necessary to prevent vessels or persons from bypassing the security measures established on shore for the events and engaging in waterborne terrorist actions during the highly-publicized events.

C. Basis and Purpose

The Coast Guard proposes to establish a temporary security zone. The proposed zone will be in effect from January 15, 2013 through January 24, 2013. The proposed zone will cover (1) all waters of the Potomac River, from shoreline to shoreline, bounded on the north by the Francis Scott Key (U.S. Route 29) Bridge at mile 113.0, downstream to and bounded on the south between the Virginia shoreline and the District of Columbia shoreline along latitude 38°50′00″ N, including the waters of the Georgetown Channel Tidal Basin; and (2) all waters of the Anacostia River, from shoreline to shoreline, bounded on the north by the 11th Street (I–295) Bridge at mile 2.1, downstream to and bounded on the south by its confluence with the Potomac River.

This rule requires that entry into or remaining in this security zone is

prohibited unless authorized by the Coast Guard Captain of the Port Baltimore. Vessels already at berth, mooring, or anchor in the security zone at the time the security zone is implemented do not have to depart the zone. All vessels underway within this security zone at the time it is implemented are to depart the zone. To seek permission to transit the area of the security zone, the Captain of the Port Baltimore can be contacted at telephone number 410–576–2693 or on Marine Band Radio VHF–FM channel 16 (156.8 MHz). Coast Guard vessels enforcing the security zone can be contacted on Marine Band Radio VHF–FM channel 16 (156.8 MHz). Federal, state, and local agencies may assist the Coast Guard in the enforcement of the security zone. The Coast Guard will issue notices to the maritime community to further publicize the security zone and notify the public of changes in the status of the zone. Such notices will continue until the event is complete.

E. Regulatory Analyses

We developed this proposed rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analyses based on a number of these statutes or executive orders.

1. Regulatory Planning and Review

This proposed rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, as supplemented by Executive Order 13563, Improving Regulation and Regulatory Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of Executive Order 12866 or under section 1 of Executive Order 13563. The Office of Management and Budget has not reviewed it under those Orders. There is no vessel traffic associated with recreational boating and commercial fishing expected during the effective period, and vessels may seek permission from the Captain of the Port Baltimore to enter and transit the zone.

2. Impact on Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered the impact of this proposed rule on small entities. The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule will not have a significant economic impact on a substantial number of small entities. This proposed rule would affect the following entities, some of which might be small entities: The owners or operators of vessels intending to operate or transit through or within the security zone during the enforcement period. Although the security zone will apply to the entire width of the Potomac and Anacostia Rivers, traffic may be allowed to pass through the zone with the permission of the Captain of the Port Baltimore. Before the effective period, maritime advisories will be widely available to the maritime community. Additionally, given the time of year this event is scheduled, the vessel traffic is expected to be minimal.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

3. Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT**, above. The Coast Guard will not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

4. Collection of Information

This proposed rule will not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

5. Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this proposed rule under that Order and determined that this rule does not have implications for federalism.

6. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places or vessels.

7. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 (adjusted for inflation) or more in any one year. Though this proposed rule would not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

8. Taking of Private Property

This proposed rule would not cause a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

9. Civil Justice Reform

This proposed rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

10. Protection of Children From Environmental Health Risks

We have analyzed this proposed rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and would not create an environmental risk to health or risk to safety that might disproportionately affect children.

11. Indian Tribal Governments

This proposed rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it would not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

12. Energy Effects

This proposed rule is not a ''significant energy action'' under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use.

13. Technical Standards

This proposed rule does not use technical standards. Therefore, we did

not consider the use of voluntary consensus standards.

14. Environment

We have analyzed this proposed rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This proposed rule involves establishing a temporary security zone. This rule is categorically excluded from further review under paragraph 34(g) of Figure 2–1 of the Commandant Instruction. A preliminary environmental analysis checklist supporting this determination and a Categorical Exclusion Determination are available in the docket where indicated under **ADDRESSES**. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1231; 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

2. Add § 165.T05–0938 to read as follows:

§ 165.0938 Security Zone, Potomac and Anacostia Rivers; Washington, DC.

(a) *Location.* The following area is a security zone:

(1) All waters of the Potomac River, from shoreline to shoreline, bounded on the north by the Francis Scott Key (U.S. Route 29) Bridge at mile 113.0, downstream to and bounded on the south between the Virginia shoreline and the District of Columbia shoreline along latitude 38°50′00″ N, including the waters of the Georgetown Channel Tidal Basin; and

(2) All waters of the Anacostia River, from shoreline to shoreline, bounded on the north by the 11th Street (I–295) Bridge at mile 2.1, downstream to and bounded on the south by its confluence with the Potomac River. All coordinates refer to datum NAD 1983.

(b) *Regulations.* The general security zone regulations found in 33 CFR 165.33 apply to the security zone created by this temporary section, § 165.T05.0938.

(1) All persons are required to comply with the general regulations governing security zones found in 33 CFR 165.33.

(2) Entry into or remaining in this zone is prohibited unless authorized by the Coast Guard Captain of the Port Baltimore. Vessels already at berth, mooring, or anchor at the time the security zone is implemented do not have to depart the security zone. All vessels underway within this security zone at the time it is implemented are to depart the zone.

(3) Persons desiring to transit the area of the security zone must first obtain authorization from the Captain of the Port Baltimore or his designated representative. Permission may be requested prior to activation of the zone. To seek permission to transit the area, the Captain of the Port Baltimore and his designated representatives can be contacted at telephone number 410–576–2693 or on Marine Band Radio VHF–FM channel 16 (156.8 MHz). The Coast Guard vessels enforcing this section can be contacted on Marine Band Radio VHF–FM channel 16 (156.8 MHz). Upon being hailed by a U.S. Coast Guard vessel, or other Federal, State, or local agency vessel, by siren, radio, flashing light, or other means, the operator of a vessel shall proceed as directed. If permission is granted, all persons and vessels must comply with the instructions of the Captain of the Port Baltimore or his designated representative and proceed at the minimum speed necessary to maintain a safe course while within the zone.

(4) *Enforcement.* The U.S. Coast Guard may be assisted in the patrol and enforcement of the zone by Federal, State, and local agencies.

(c) *Definitions.* As used in this section:

Captain of the Port Baltimore means the Commander, U.S. Coast Guard Sector Baltimore, Maryland.

Designated representative means any Coast Guard commissioned, warrant, or petty officer who has been authorized by the Captain of the Port Baltimore to assist in enforcing the security zone described in paragraph (a) of this section.

(d) *Effective period.* This section will be enforced from 8 a.m. on January 15, 2013 through 10 p.m. on January 24, 2013.

Dated: November 15, 2012.

Brian W. Roche,

Commander, U.S. Coast Guard, Acting Captain of the Port Baltimore.

[FR Doc. 2012–28790 Filed 11–27–12; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 17

RIN 2900–AO46

Authorization for Non-VA Medical Services

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) proposes to amend its regulation governing payment by VA for non-VA outpatient care under VA's statutory authority to provide non-VA care. Under this authority, VA may contract for certain hospital care (inpatient care) and medical services (outpatient care) for eligible veterans when VA facilities are not capable of providing such services due to geographical inaccessibility or are not capable of providing the services needed. This proposed amendment would revise VA's existing regulation in accordance with statutory authority to remove a limitation on which veterans are eligible for medical services under this authority.

DATES: VA must receive comments on or before December 28, 2012.

ADDRESSES: Written comments may be submitted through *www.Regulations.gov;* by mail or hand-delivery to the Director, Regulation Policy and Management (02REG), Department of Veterans Affairs, 810 Vermont Ave. NW., Room 1068, Washington, DC 20420; or by fax to (202) 273–9026. This is not a toll-free number. Comments should indicate that they are submitted in response to ''RIN 2900–AO46—Authorization for Non-VA Medical Services.'' Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1068, between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 461–4902 for an appointment. This is not a toll-free number. In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at *www.Regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Lisa Brown, Chief, Policy Management Department, Department of Veterans Affairs, Chief Business Office, Purchased Care, 3773 Cherry Creek North Drive, Suite 450, Denver, CO 80209 at (303) 331–7829. This is not a toll-free number.

SUPPLEMENTARY INFORMATION: Over the past two decades, the healthcare industry has increasingly emphasized providing care in the least restrictive environment. Care that was provided in hospitals is now provided with a full range of outpatient and ambulatory care options previously unavailable. VA has adopted this trend toward outpatient and ambulatory care and, whenever possible, provides treatment options to veterans in these less restrictive modes of healthcare delivery. Although VA has made great strides to expand the delivery of healthcare to veterans, VA is, like the rest of the healthcare industry, economically unable to provide all possible services at all VA-operated venues of care. VA addresses this in part by authorizing non-VA care when necessary to meet the veteran's plan of care.

VA uses the authority in 38 U.S.C. 1703 to provide certain hospital care and medical services to eligible veterans when VA facilities are not capable of providing such services due to geographical inaccessibility or are not capable of providing the services needed, ensuring the continuity of care for the patient and the maximization of healthcare resources. VA may use this authority to provide needed non-VA care using community resources, such as private physicians or community hospitals. Care provided under VA's authority in 38 U.S.C. 1703 is usually referred to as the Non-VA Care program. Non-VA care enables VA to maximize resources and available options for patient care at the local level, providing care in the least restrictive mode possible and closer to the patient's home.

Public Law 104–262, 104(b)(2)(B) amended 38 U.S.C. 1703(a)(2)(B) to expand VA's authority to provide non-VA medical services under the non-VA care authority. As amended, the law authorizes VA to provide such medical services for a veteran who has been furnished hospital care, nursing home care, domiciliary care, or medical services and who requires medical services to complete treatment incident to such care or services.

At present, 38 CFR 17.52(a)(2)(ii) provides that ''[a] veteran who has received VA inpatient care for treatment of nonservice-connected conditions for which treatment was begun during the period of inpatient care'' is eligible for non-VA medical services under the non-VA care authority. The existing VA regulation does not reflect the amendment made by Public Law 104–262 to 38 U.S.C. 1703(a)(2)(B). This VA regulation thus does not permit VA to complete a veteran's treatment through non-VA providers under the non-VA care authority unless the VA treatment was begun during a period of hospitalization.

VA proposes to amend 38 CFR 17.52(a)(2)(ii) to reflect the current statutory authority found at 38 U.S.C. 1703(a)(2)(B). In doing so, VA would increase the availability of care in areas where VA cannot directly provide the care. Proposed paragraph (a)(2)(ii) of this revised regulation would provide that veterans who have been furnished hospital care, nursing home care, domiciliary care, or medical services, and who require medical services to complete treatment incident to such care or services, would be eligible for non-VA medical services under the non-VA care authority. By expanding veterans' eligibility for non-VA care, VA would be able to better utilize resources and enhance patient care at the local level. This regulation would give VA greater flexibility to refer patients for care in the least restrictive and most convenient setting.

This revision to § 17.52(a)(2)(ii) would clarify the time period during which veterans are eligible to receive non-VA care to complete their treatments. Currently, § 17.52(a)(2)(ii) states that the non-VA care treatment period, which includes ''care furnished in both facilities of VA and non-VA facilities or any combination of such modes of care,'' is limited to no more than 12 months after the veteran is discharged from the hospital, unless VA determines that the veteran requires continued non-VA care ''by virtue of the disabilities being treated.'' This revision would clarify that each authorization for non-VA care needed to complete treatment may continue for up to 12 months, and that VA may issue new authorizations as needed. The requirement to issue a new authorization would give VA an opportunity to determine whether non-VA care continues to be the appropriate means of providing the veteran's treatment.

We note that this proposed amendment would only affect the eligibility of certain veterans for medical services provided by a non-VA provider under the non-VA care authority in 38 U.S.C. 1703; this proposed amendment would not require providers outside of VA to accept VA patients. We also note that this proposed amendment would not affect other provisions in this regulation that specify veterans' eligibility for non-VA care.

Administrative Procedure Act

Concurrent with this proposed rule, we also are publishing a separate, substantively identical direct final rule in the ''Rules and Regulations'' section of this **Federal Register**. (See RIN 2900–AO47.) The simultaneous publication of these documents will speed notice and comment rulemaking under section 553 of the Administrative Procedure Act should we have to withdraw the direct final rule due to receipt of any significant adverse comment.

For purposes of the direct final rulemaking, a significant adverse comment is one that explains why the rule would be inappropriate, including challenges to the rule's underlying premise or approach, or why it would be ineffective or unacceptable without change. If VA receives a significant adverse comment, VA will publish a notice of receipt of a significant adverse comment in the **Federal Register** and withdraw the direct final rule.

Under direct final rule procedures, if no significant adverse comment is received within the comment period, the direct final rule will become effective on the date specified in RIN 2900–AO47. After the close of the comment period, VA will publish a document in the **Federal Register** indicating that VA received no significant adverse comment and restating the date on which the final rule will become effective. VA will also publish a notice withdrawing this proposed rule.

In the event that VA withdraws the direct final rule because of receipt of any significant adverse comment, VA will proceed with this rulemaking by addressing the comments received and publishing a final rule. The comment period for this proposed rule runs concurrently with that of the direct final rule. VA will treat any comments received in response to the direct final rule as comments regarding this proposed rule. VA will consider such comments in developing a subsequent final rule. Likewise, VA will consider any significant adverse comment received in response to the proposed rule as a comment regarding the direct final rule. VA has determined that it is not necessary to provide a 60-day comment period for this rulemaking that would merely align a current regulation with existing statutory authority and make a minor modification concerning determination of the time period during which veterans are eligible to receive

non-VA care to complete their treatments. VA has instead specified that comments must be received within 30 days of publication in the **Federal Register**.

Effect of Rulemaking

Title 38 of the Code of Federal Regulations, as proposed to be revised by this rulemaking, represents VA's implementation of its legal authority on this subject. Other than future amendments to this regulation or governing statutes, no contrary guidance or procedures are authorized. All existing or subsequent VA guidance must be read to conform with this rulemaking if possible or, if not possible, such guidance is superseded by this rulemaking.

Paperwork Reduction Act

This proposed rule contains no provisions constituting a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521).

Regulatory Flexibility Act

The Secretary hereby certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities as defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. This proposed rule would affect only VA beneficiaries and does not affect a substantial number of small entities. Because this proposed rule would update an existing regulation to make it consistent with existing statutory authority and reflect current and long-standing VA practices, VA anticipates no additional expenditures or actions as a result of this rule. Therefore, under 5 U.S.C. 605(b), this proposed amendment is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 12866 (Regulatory Planning and Review) defines a ''significant regulatory action'' requiring review by the Office of Management and Budget (OMB) as ''any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order.''

The economic, interagency, budgetary, legal, and policy implications of this regulatory action have been examined, and it has been determined not to be a significant regulatory action under Executive Order 12866.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in expenditures by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more, adjusted annually for inflation, in any one year. This proposed rule would have no such effect on State, local, and tribal governments, or on the private sector.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance numbers and titles for the programs affected by this document are 64.007, Blind Rehabilitation Centers; 64.008, Veterans Domiciliary Care; 64.009, Veterans Medical Care Benefits; 64.010, Veterans Nursing Home Care; 64.011, Veterans Dental Care; 64.012, Veterans Prescription Service; 64.013, Veterans Prosthetic Appliances; 64.014, Veterans State Domiciliary Care; 64.015, Veterans State Nursing Home Care; 64.018, Sharing Specialized Medical Resources; 64.019, Veterans Rehabilitation Alcohol and Drug Dependence; 64.022, Veterans Home Based Primary Care; and 64.024, VA Homeless Providers Grant and Per Diem Program.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. John R. Gingrich, Chief of Staff, Department of Veterans Affairs, approved this document on November 20, 2012, for publication.

List of Subjects in 38 CFR Part 17

Administrative practice and procedure, Alcohol abuse, Alcoholism, Claims, Day care, Dental health, Drug abuse, Government contracts, Grant programs—health, Government programs—veterans, Health care, Health facilities, Health professions, Health records, Homeless, Mental health programs, Nursing homes, Reporting and recordkeeping requirements, Veterans.

Dated: November 21, 2012.

Robert C. McFetridge,

Director, Regulation Policy and Management, Office of the General Counsel, Department of Veterans Affairs.

For the reasons stated in the preamble, the Department of Veterans Affairs proposes to amend 38 CFR part 17 as follows:

PART 17—MEDICAL

1. The authority citation for part 17 continues to read as follows:

Authority: 38 U.S.C. 501, and as noted in specific sections.

2. Revise § 17.52(a)(2)(ii) to read as follows:

§ 17.52 Hospital care and medical services in non-VA facilities.

(a) * * *

(2) * * *

(ii) A veteran who has been furnished hospital care, nursing home care, domiciliary care, or medical services, and requires medical services to complete treatment incident to such care or services (each authorization for non-VA treatment needed to complete treatment may continue for up to 12 months, and new authorizations may be issued by VA as needed), and

* * * * *

[FR Doc. 2012–28776 Filed 11–27–12; 8:45 am]

BILLING CODE 8320–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 79

[MB Docket No. 12–107; FCC 12–142]

Accessible Emergency Information, and Apparatus Requirements for Emergency Information and Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Commission proposes rules to implement provisions of the Twenty-First Century Communications and Video Accessibility Act of 2010 (''CVAA'') that mandate regulations to ensure that emergency information is accessible to individuals who are blind and visually disabled and that television apparatus are able to make available video description and accessible emergency information. The Commission seeks comment on rules that would apply to the distributors, providers, and owners of television video programming, as well as the manufacturers of devices that display such programming.

DATES: Comments are due on or before December 18, 2012; reply comments are due on or before December 28, 2012. Written comments on the Paperwork Reduction Act proposed information collection requirements must be submitted by the public, Office of Management and Budget (OMB), and other interested parties on or before January 28, 2013.

ADDRESSES: You may submit comments, identified by MB Docket No. 12–107, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Federal Communications Commission's Web Site: http://fjallfoss.fcc.gov/ecfs2/*. Follow the instructions for submitting comments.
- *Mail:* Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.
- *People with Disabilities:* Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by email: *FCC504@fcc.gov* or phone: (202) 418–0530 or TTY: (202) 418–0432.

In addition to filing comments with the Secretary, a copy of any comments on the Paperwork Reduction Act proposed information collection requirements contained herein should be submitted to the Federal Communications Commission via email to *PRA@fcc.gov* and to Nicholas A. Fraser, Office of Management and Budget, via email to *Nicholas_A._Fraser@omb.eop.gov* or via fax at (202) 395–5167. For detailed instructions for submitting comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: For additional information on this proceeding, contact Diana Sokolow, *Diana.Sokolow@fcc.gov*, or Maria Mullarkey, *Maria.Mullarkey@fcc.gov*, of the Policy Division, Media Bureau, (202) 418–2120. For additional information concerning the Paperwork Reduction Act information collection requirements contained in this document, send an email to *PRA@fcc.gov* or contact Cathy Williams at (202) 418–2918.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Notice of Proposed Rulemaking, FCC 12–142, adopted on November 16, 2012, and released on November 19, 2012. The full text is available for public inspection and copying during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street SW., Room CY–A257, Washington, DC 20554. This document will also be available via ECFS at *http://fjallfoss.fcc.gov/ecfs/*. Documents will be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat. The complete text may be purchased from the Commission's copy contractor, 445 12th Street SW., Room CY–B402, Washington, DC 20554. Alternative formats are available for people with disabilities (Braille, large print, electronic files, audio format), by sending an email to *fcc504@fcc.gov* or calling the Commission's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

This document contains proposed information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995, Public Law 104–13. Public and agency comments are due January 28, 2013.

Comments should address: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and (e) ways to further reduce the information collection burden on small business concerns with fewer than 25 employees. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4), we seek specific comment on how we might further reduce the information collection burden for small business concerns with fewer than 25 employees.

To view or obtain a copy of this information collection request (ICR) submitted to OMB: (1) Go to this OMB/GSA Web page: *http://www.reginfo.gov/public/do/PRAMain*, (2) look for the section of the Web page called ''Currently Under Review,'' (3) click on the downward-pointing arrow in the ''Select Agency'' box below the ''Currently Under Review'' heading, (4) select ''Federal Communications Commission'' from the list of agencies presented in the ''Select Agency'' box, (5) click the ''Submit'' button to the right of the ''Select Agency'' box, and (6) when the list of FCC ICRs currently under review appears, look for the OMB control number of this ICR as show in the **SUPPLEMENTARY INFORMATION** section below (or its title if there is no OMB control number) and then click on the ICR Reference Number. A copy of the FCC submission to OMB will be displayed.

OMB Control Number: 3060–0967.

Title: Section 79.2, Accessibility of Programming Providing Emergency Information; Complaints Alleging Violations of the Apparatus Emergency Information and Video Description Requirements.

Form No.: Not applicable.

Type of Review: Revision of a currently approved collection.

Respondents: Individuals or households; businesses or other for-profit entities; not-for-profit institutions; State, local, or tribal governments.

Number of Respondents and Responses: 80 respondents; 80 responses.

Estimated Time per Response: 1–3 hours.

Frequency of Response: On occasion reporting requirement; Third party disclosure requirement.

Obligation to Respond: Voluntary. The statutory authority for this collection of information is contained in the Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. 111–260, 124 Stat. 2751, and 47 U.S.C. 151, 152(a), 154(i), 154(j), 303, 307, 309, 310, 330(b) and 613.

Total Annual Burden: 93 hours.

Total Annual Costs: $12,600.

Privacy Act Impact Assessment: Yes. The Privacy Impact Assessment (PIA) was completed on June 28, 2007. It may be reviewed at: *http://www.fcc.gov/omd/privacyact/Privacy_Impact_Assessment.html*. The Commission is in the process of updating the PIA to incorporate various revisions made to the SORN.

Nature and Extent of Confidentiality: Confidentiality is an issue to the extent that individuals and households provide personally identifiable information, which is covered under the FCC's system of records notice (SORN), FCC/CGB–1, ''Informal Complaints and Inquiries.'' As required by the Privacy Act, 5 U.S.C. 552a, the Commission also published a SORN, FCC/CGB–1 ''Informal Complaints and Inquiries,'' in the **Federal Register** on December 15, 2009 (74 FR 66356) which became effective on January 25, 2010.

Needs and Uses: The Commission is seeking approval for this proposed information collection from the Office of Management and Budget (OMB). On November 19, 2012, the Commission released a Notice of Proposed Rulemaking, MB Docket No. 12–107; FCC 12–142. This rulemaking proposed information collection requirements that support the Commission's accessible emergency information and apparatus rules that would be codified at 47 CFR 79.2, 79.105, and 79.106, as required by the CVAA.

The proposed information collection requirements consist of:

Complaints alleging violations of the emergency information rules.

Pursuant to existing rule 47 CFR 79.2, consumers may file complaints alleging violations of the accessible emergency information requirements. As a result of the proposed revisions to the existing rule, we have estimated in increase in the number of complaints filed annually pursuant to this rule.

Complaints alleging violations of the apparatus emergency information and video description requirements.

Pursuant to proposals contained in the NPRM, consumers could file complaints alleging violations of the proposed rules containing apparatus emergency information and video description requirements, 47 CFR 79.105–79.106. A complaint alleging a violation of the apparatus rules related to emergency information and video description may be transmitted to the Consumer and Governmental Affairs Bureau by any reasonable means, such as the Commission's online informal complaint filing system, letter in writing or Braille, facsimile transmission, telephone (voice/TRS/TTY), email, or some other method that would best accommodate the complainant's disability. Given that the population intended to benefit from the rules adopted would be blind or visually impaired, if a complainant calls the Commission for assistance in preparing a complaint, Commission staff would document the complaint in writing for the consumer and such communication would be deemed a written complaint. The NPRM proposes that such complaints should include certain information about the complainant and the alleged violation. The Commission will forward such complaints, as appropriate, to the named manufacturer or provider for its response, as well as to any other entity that Commission staff determines may be involved, and may request additional information from any relevant parties when, in the estimation of Commission staff, such information is needed to investigate the complaint or adjudicate potential violations of Commission rules. The Commission is seeking OMB approval for the proposed information collection requirements.

Summary of the Notice of Proposed Rulemaking

I. Introduction

1. The Federal Communications Commission (''Commission'') initiates this proceeding to implement the provisions of the Twenty-First Century Communications and Video Accessibility Act of 2010 (''CVAA'') requiring that emergency information be made accessible to individuals who are blind or visually impaired and that certain equipment be capable of delivering video description and emergency information to those individuals. First, pursuant to section 202 of the CVAA, this Notice of Proposed Rulemaking (''*NPRM*'') proposes to make televised emergency information [1] more accessible to individuals who are blind or visually impaired by requiring the use of a secondary audio stream to provide emergency information aurally that is conveyed visually during programming other than newscasts. Second, we seek comment under section 203 of the CVAA on how to ensure that television apparatus are able to make available video description,[2] as well as to make emergency information accessible to individuals who are blind or visually impaired. Our section 203 discussion focuses on the availability of secondary audio streams, because that is both the mechanism for providing video description and our proposed mechanism for making emergency information accessible.[3] Our goal in this proceeding is to enable individuals who are blind or visually impaired to access emergency information and video description services more easily. The proposed revisions to our rules will help fulfill the purpose of the CVAA to ''update the communications laws to help ensure that individuals with disabilities are able to fully utilize communications services and equipment and better access video programming.'' H.R. Rep. No. 111–563, 111th Cong., 2d Sess. at 19 (2010) (''House Committee Report''); S. Rep. No. 111–386, 111th Cong., 2d Sess. at 1 (2010) (''Senate Committee Report'').

II. Background

2. Section 202 of the CVAA requires the Commission to complete a proceeding to ''identify methods to

[1] ''Emergency information'' is defined in the Commission's rules as ''[i]nformation, about a current emergency, that is intended to further the protection of life, health, safety, and property, *i.e.,* critical details regarding the emergency and how to respond to the emergency.'' 47 CFR 79.2(a)(2). Emergency information might pertain to emergencies such as ''tornadoes, hurricanes, floods, tidal waves, earthquakes, icing conditions, heavy snows, widespread fires, discharge of toxic gases, widespread power failures, industrial explosions, civil disorders, school closings and changes in school bus schedules resulting from such conditions, and warnings and watches of impending changes in weather.'' *Id.* ''Critical details include, but are not limited to, specific details regarding the areas that will be affected by the emergency, evacuation orders, detailed descriptions of areas to be evacuated, specific evacuation routes, approved shelters or the way to take shelter in one's home, instructions on how to secure personal property, road closures, and how to obtain relief assistance.'' Note to 47 CFR 79.2(a)(2).

[2] ''Video description'' is defined as ''[t]he insertion of audio narrated descriptions of a television program's key visual elements into natural pauses between the program's dialogue.'' 47 CFR 79.3(a)(3).

[3] A separate proceeding will address sections 204 and 205 of the CVAA, which pertain to user interfaces and video programming guides and menus. Public Notice, *Media Bureau and Consumer and Governmental Affairs Bureau Seek Comment on Second VPAAC Report: User Interfaces, and Video Programming Guides and Menus,* 27 FCC Rcd 4191 (2012).

convey emergency information (as that term is defined in § 79.2 of title 47, Code of Federal Regulations) in a manner accessible to individuals who are blind or visually impaired.'' [4] 47 U.S.C. 613(g)(1). The Commission must also ''promulgate regulations that require video programming providers and video programming distributors (as those terms are defined in § 79.1 of title 47, Code of Federal Regulations) and program owners to convey such emergency information in a manner accessible to individuals who are blind or visually impaired.'' 47 U.S.C. 613(g)(2). In addition, section 203 of the CVAA directs the Commission to prescribe regulations requiring apparatus to have the capability to decode and make available emergency information in a manner that is accessible to individuals who are blind or visually impaired, and to decode and make available video description services. 47 U.S.C. 303(u)(1). The CVAA requires that the Commission complete its proceeding on access to emergency information by April 9, 2013, and on apparatus requirements for video description and emergency information by October 9, 2013.

3. The CVAA also required the Chairman of the Commission to establish an advisory committee known as the Video Programming Accessibility Advisory Committee (''VPAAC''). The Commission announced the establishment of the VPAAC on December 7, 2010, and the committee began meeting in January 2011. The VPAAC divided itself into four advisory working groups, with Working Group 3 focused on emergency information and Working Group 2 focused on video description. Section 201(e)(2) of the CVAA required the VPAAC to submit a report on video description and emergency information to the Commission within 18 months after the date of enactment of the CVAA, or by April 9, 2012. The VPAAC submitted this report on April 9, 2012.[5] In the VPAAC Second Report, Working Group 3 presented its findings on methods to convey emergency information to individuals who are blind or visually impaired, including alternatives that it considered and rejected. Working Group 3 concluded that crawls containing emergency information should be made accessible to persons who are blind or visually impaired by transmitting an audio representation of the emergency information on a secondary audio stream, as the Commission now proposes. Working Group 3 also suggested issues that should be analyzed further, and it described variables that may affect implementation deadlines. In a separate section of the same report, Working Group 2 presented information on technical capabilities, protocols, and procedures by which video description reaches the consumer, as well as developments for the delivery of video description. Working Group 2 then set forth its findings and recommendations pertaining to the creation and delivery of video description.[6] The Media Bureau and the Consumer and Governmental Affairs Bureau sought comment on the portions of the VPAAC Second Report that address emergency information and video description.

4. The Commission previously addressed the issue of making televised emergency information accessible to those who are blind or visually impaired in 2000. *Implementation of Video Description of Video Programming,* Report and Order, 65 FR 54805 (2000) (''*2000 Video Description Order*''). The Commission adopted a rule that required broadcast stations and multichannel video programming distributors (''MVPDs'') ''that provide[] local emergency information to make the critical details of that information accessible to persons with visual disabilities'' in certain situations. Specifically, pursuant to § 79.2 of the Commission's rules, the emergency information requirements for accessibility to persons with visual disabilities vary based on whether the information is provided in the video portion of a newscast. First, if emergency information is provided in the video portion of a regularly scheduled newscast, or in the video portion of a newscast that interrupts regular programming, it must be made accessible to people who are blind or visually impaired.[7] 47 CFR 79.2(b)(1)(ii). This requires the aural presentation of emergency information that is being provided to viewers visually to be included as part of the primary program audio stream. Second, if emergency information is provided solely visually during programming that is not a newscast (such as through an on-screen crawl), it must be accompanied by an aural tone. 47 CFR 79.2(b)(1)(iii). It is the second situation that is the focus of the instant proceeding. Industry has coalesced around the use of three high-pitched tones to indicate the presence of on-screen emergency information, although the Commission's rules do not specify that three tones must be used. In this situation, when an individual who is blind or visually impaired hears the three tones, he or she must take some other action, such as turning on a radio, to determine the nature and severity of the situation. As a result, individuals who are blind or visually impaired may have inadequate or untimely access to emergency information. This proceeding seeks to remedy this situation by ensuring that the critical details of emergency information provided visually during programming other than a newscast will be fully accessible to those members of the program's audience who are blind or visually impaired.

5. In addition to emergency information, we also consider access to video description in this proceeding. Video description services make video programming accessible to individuals who are blind or visually impaired. Video description is the insertion of audio narrated descriptions of a

[4] Accessibility of this emergency information is a separate matter from accessibility of an activation of the Emergency Alert System (''EAS''), which facilitates emergency communications from the President, the heads of State and local government, their designated representatives, or the National Weather Service. *See* 47 CFR 11.1. In this proceeding we consider revisions to § 79.2 of our rules, whereas EAS is governed by Part 11 of our rules. *Compare* 47 CFR 79.2 with 47 CFR part 11. In a separate proceeding, the Commission considers ways to make EAS alerts more accessible to persons with disabilities. While the EAS rules apply only to certain emergency communications, as stated above, § 79.2 of the Commission's rules applies more broadly to televised emergency information. *Compare* 47 CFR 11.1 with 47 CFR 79.2.

[5] Second Report of the Video Programming Accessibility Advisory Committee on the Twenty-First Century Communications and Video Accessibility Act of 2010, available at *http://vpaac.wikispaces.com* (''VPAAC Second Report''). The portion of the report that addresses video description is available at *http://vpaac.wikispaces.com/file/view/120409+VPAAC+Video+Description+REPORT+AS+SUBMITTED+4-9-2012.pdf.* The portion of the report that addresses access to emergency information is available at *http://vpaac.wikispaces.com/file/view/120409+VPAAC+Access+to+Emergency+Information+REPORT+AS+SUBMITTED+4-9-2012.pdf.*

[6] In presenting its findings and recommendations, the VPAAC discussed the consumer position separately from the industry position where there was not a consensus. Additionally, we note that the VPAAC presented certain recommendations regarding the provision of information about programming that is video described, including proposals that entities be required to provide information about video described programming on their Web sites and to programming information distributors. These issues are beyond the scope of this proceeding, and accordingly we will not consider them here.

[7] Section 79.2 contains a separate requirement that video programming distributors must make emergency information that is provided in the audio portion of the programming accessible to persons with hearing disabilities by using closed captioning or a method of visual presentation. 47 CFR 79.2(b)(1)(i). That requirement is not at issue in this proceeding. Instead, this proceeding involves the portions of § 79.2(b) concerning accessibility to persons with visual disabilities. 47 CFR 79.2(b)(1)(ii) through (iii).

television program's key visual elements into natural pauses between the program's dialogue. 47 CFR 79.3(a)(3). Last year, as directed by the CVAA, the Commission reinstated, with certain modifications, video description rules previously vacated by the United States Court of Appeals for the District of Columbia Circuit. *See* 47 U.S.C. 613(f)(1)–(2); *Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010,* Report and Order, 76 FR 55585 (2011) (''*2011 Video Description Order*''). The rules require full-power affiliates of the top four national networks located in the top 25 television markets to provide 50 hours per calendar quarter of video-described prime time and/or children's programming. The rules also require MVPDs that operate systems with 50,000 or more subscribers to provide 50 hours per calendar quarter of video-described prime time and/or children's programming on each of the top five non-broadcast networks that they carry on those systems. Broadcast television stations and MVPDs must additionally ''pass through'' video description if they have the technical capability to do so. Broadcasters and MVPDs were required to be in full compliance with these requirements beginning on July 1, 2012. Video descriptions for digital television are provided as a secondary audio service, and typically a viewer can access video description through an onscreen menu provided by the viewer's home television receiver or set-top box.

III. Discussion

6. At the outset, we do not, at this time, extend the scope of the emergency information and video description rules in this proceeding beyond the category of programming already covered by our existing emergency information and video description rules.[8] 47 CFR 79.2(a)–(b), 79.3(a)–(c). In other words, for purposes of this proceeding, the emergency information and video description rules will continue to apply to television broadcast services and MVPD services, but not to IP-delivered video programming that is not otherwise an MVPD service. Notably, Congress did not explicitly extend the scope of the emergency information rules to IP-delivered video programming, as it did in requiring closed captioning of IP-delivered video programming.[9] *See* 47 U.S.C. 613(c). Instead, Congress referenced television-based definitions of video programming distributors and providers. 47 U.S.C. 613(g)(2). In addition, as a practical matter, we note that the VPAAC found that ''at this time * * * there does not appear to be any uniform or consistent methodology for delivering emergency information via the Internet.'' Similarly, we note that the CVAA directs that the Commission's video description regulations ''shall apply to video programming * * * insofar as such programming is transmitted for display on television in digital format.'' 47 U.S.C. 613(f)(2)(A). Accordingly, the video description rules require video description only by television broadcast stations and MVPDs. Consistent with this view and as explained more fully below, we propose to limit the scope of the apparatus rules that the Commission will adopt in this proceeding to apparatus that make available the type of programming that is subject to our existing emergency information rules, as set forth in § 79.2, and our existing video description rules, as set forth in § 79.3, *i.e.,* apparatus designed to receive, play back, or record broadcast or MVPD service. We seek comment on this analysis.

A. Accessible Emergency Information

7. The CVAA requires us to ''promulgate regulations that require video programming providers and video programming distributors [as defined in § 79.1 of our rules] and program owners to convey such emergency information in a manner accessible to individuals who are blind or visually impaired.'' 47 U.S.C. 613(g)(2). Based upon the VPAAC Second Report and the record assembled in this proceeding regarding the relative advantages and disadvantages of several possible methods, discussed below, we propose to require covered entities to make emergency information that is provided visually during programming that is not a newscast (such as that provided via crawls) accessible to individuals who are blind or visually impaired by using a secondary audio stream to provide that emergency information aurally and concurrently with the emergency information being conveyed visually.

8. As noted above, our emergency information rules currently require video programming distributors to do two things to make emergency information accessible to individuals who are blind or visually impaired.[10] First, for emergency information that is provided in the video portion of a regularly scheduled newscast or a newscast that interrupts regular programming, they must make the emergency information accessible to persons with visual disabilities. 47 CFR 79.2(b)(1)(ii). This accessibility is achieved through the aural presentation in the main program audio of emergency information that is being provided to viewers visually. No commenters indicated a need to revise the existing rules for this situation. We, therefore, do not propose any substantive changes to this requirement and expect covered entities to comply with the existing rule.

9. Second, for emergency information that is provided in the video portion of programming that is not a regularly scheduled newscast or a newscast that interrupts regular programming, under our current rules video programming distributors must accompany the emergency information with an aural tone. 47 CFR 79.2(b)(1)(iii). We seek comment on our proposal to modify this requirement as the VPAAC advocates by requiring video programming distributors to make emergency information available on a secondary audio stream, if that information is provided visually in programming that

[8] We note that Congress directed the Commission to conduct inquiries on further video description requirements in the future. 47 U.S.C. 613(f)(3).

[9] We note, however, that Congress charged the VPAAC to report and make recommendations to the Commission with respect to the delivery of accessible emergency information and video description using IP. Public Law 111–260, sections 201(e)(2)(B), (C), and (E) (charging the VPAAC to identify ''the performance objectives * * * needed to permit content providers, content distributors, Internet service providers, software developers, and device manufacturers to reliably encode, transport, receive, and render video descriptions of video programming, except for consumer generated media, and emergency information delivered using Internet protocol or digital broadcast television''; to identify ''additional protocols * * * for the delivery of video descriptions of video programming, except for consumer generated media, and emergency information delivered using Internet protocol or digital broadcast television * * *''; and to recommend ''any regulations that may be necessary to ensure compatibility between video programming, except for consumer generated media, delivered using Internet protocol or digital broadcast television and devices capable of receiving and displaying such programming, except for consumer generated media, in order to facilitate access to video descriptions and emergency information'').

[10] We note that, in addition to the provisions addressing accessibility to individuals who are blind or visually impaired, our emergency information rules also contain a provision addressing accessibility to individuals with hearing disabilities. 47 CFR 79.2(b)(1)(i) (requiring that ''[e]mergency information that is provided in the audio portion of the programming must be made accessible to persons with hearing disabilities by using a method of closed captioning or by using a method of visual presentation, as described in § 79.1 of this part''). The emergency information provisions of section 202 of the CVAA are focused on individuals who are blind or visually impaired, and not on individuals who are deaf or hearing impaired. 47 U.S.C. 613(g) (requiring the Commission to adopt rules relating to conveying emergency information ''in a manner accessible to individuals who are blind or visually impaired''). Accordingly, accessibility of emergency information to individuals who are deaf or hard of hearing is not at issue in this proceeding.

is not a newscast.[11] Under this approach, consumers would be alerted to the presence of such emergency information through the already-required aural tone that accompanies this emergency information, and the emergency information would be accessible to consumers who are blind or visually impaired who switch to a secondary audio stream. The VPAAC, which includes representatives of the industry and consumer groups, supports the use of a secondary audio stream for this purpose. According to the VPAAC, MVPDs, including cable operators, direct broadcast satellite (''DBS'') providers, and Internet protocol television providers (''IPTV providers''), are technically capable of providing access to emergency information through the secondary audio streams. The National Association of Broadcasters (''NAB'') also supports the approach of using the secondary audio stream to provide emergency information that is conveyed in an onscreen crawl in a manner that is audibly accessible.

10. We seek comment on the benefits of providing accessible emergency information on a secondary audio stream and the incremental costs of providing a secondary audio stream for this purpose. Are there any broadcasters or MVPDs that do not currently provide a secondary audio stream, and if so, should the new rules apply any differently to them? We explained in the *2011 Video Description Order* that certain stations and MVPDs may lack the technical capability to pass through video description, and therefore the Commission reinstated a technical capability exception. Are there technical capability issues that should be taken into account in the context of requiring emergency information to be provided on a secondary audio stream? If lack of technical capability is an issue, how should the Commission consider it in revising its emergency information rules as proposed herein? If a video programming distributor does not currently make available a secondary audio stream, but it has the technical capability to do so, should the Commission require it to make available a secondary audio stream that could be used to provide emergency information? Or are there alternative ways for video programming distributors that do not have a secondary audio stream to provide such information? What impact, if any, would the proposals contained in this *NPRM* have on broadcasters' ability to channel share? What additional bandwidth, if any, would MVPDs need to transmit multiple audio streams, and how would this affect their networks if they carry multiple audio streams for all channels? Are any broadcasters or MVPDs providing more than two audio streams? If there are more than two audio streams available, what is provided or should be provided on those audio streams and how will consumers know which one to tune to for emergency information? Should aurally accessible emergency information always be provided on the audio stream containing video description, rather than on a stream dedicated to aurally accessible emergency information or containing other program-related material, such as a Spanish or other language audio stream? We seek comment on whether and how the proposals contained herein should apply to EAS alerts. For example, to what extent is emergency information provided as visual-only EAS alerts? *See* 47 CFR 11.51.

11. We invite input on the implementation of our proposal to require covered entities to make emergency information that is provided visually during programming that is not a newscast (such as that provided via crawls) accessible to individuals who are blind or visually impaired by using a secondary audio stream to provide that emergency information aurally and concurrently with the emergency information being conveyed visually. What time frame is appropriate for requiring covered entities to convey emergency information in a secondary audio stream? What steps must covered entities take to meet this requirement? Should we require covered entities to provide customer support services to assist consumers who are blind or visually impaired to navigate between the main and secondary audio streams to access accessible emergency information? We seek comment on whether the Commission should update its definition of ''emergency information.'' *See* 47 CFR 79.2(a)(2). For example, to what extent are severe thunderstorms currently considered to be ''emergencies'' subject to our rule? To the extent they are currently covered, should they be added to the list of examples in the rule? Are there other examples of emergencies that should explicitly be included in our definition of ''emergency information''? What impact would revising our definition of emergency information have on the availability of video description, given that, under our proposal above, both services will be provided using a secondary audio stream?

12. Assuming the Commission requires that visual emergency information be made accessible by means of a secondary audio stream, to what extent should the Commission permit the use of text-to-speech (''TTS'') technologies? TTS is a technology that generates an audio version of a textual message. The VPAAC found TTS to be essential for conveying emergency information because of the speed with which it can generate the necessary audio.[12] In a proceeding regarding EAS earlier this year, the Commission initially noted ''concerns in the record about whether text-to-speech software is sufficiently accurate and reliable to deliver consistently accurate and timely alerts to the public,'' and deferred consideration of that issue to a later proceeding. However, upon reconsideration, the Commission subsequently determined that it would permit, but not require, regulated entities to use TTS to render EAS audio from the text of EAS alerts formatted in the Common Alerting Protocol until the merits of mandating TTS use for EAS purposes have been more fully developed in the record. We seek comment on the accuracy and reliability of current TTS technology and, more specifically, whether it is sufficiently accurate and reliable for rendering an aural translation of emergency information text on a secondary audio stream, as proposed above. What would be the costs and benefits of using TTS for this purpose? We also seek comment on other concerns related to this issue, including the need to timely provide emergency information. To the extent commenters consider TTS too unreliable for this purpose, we seek comment on how TTS can be made more reliable, as well as effective and timely alternatives to TTS and their costs and benefits.

[11] We also propose a non-substantive edit to our existing emergency information rules. Specifically, we propose to change references to ''[e]mergency information that is provided in the video portion'' in the current rules to ''[e]mergency information that is provided visually.'' We welcome comment on this proposal.

[12] We also note that, if textual data is also transmitted as a separate file within the broadcast stream, it can also be made available for other assistive technologies and language translation systems that have the potential to enhance access to emergency information both for consumers with and without visual impairments. For example, in addition to providing audio, apparatus could display the textual information in large print for viewers who are deaf and have a visual impairment. Further, by permitting the text to be converted to speech in the apparatus, it could be possible for an apparatus to translate emergency information to a language other than English, or to provide emergency information when the viewer is using that apparatus for something other than watching covered video programming. We seek comment on these possibilities.

13. Should we require emergency information presented aurally to be identical to that presented textually, or should differences be permissible as long as the information presented aurally is comprehensive and satisfies the requirements of § 79.2(a)(2)? We note that emergency information is defined as ''[i]nformation, about a current emergency, that is intended to further the protection of life, health, safety, and property, *i.e.,* critical details regarding the emergency and how to respond to the emergency.'' 47 CFR 79.2(a)(2). The rule's accompanying note requires the inclusion of ''*specific* details regarding the areas that will be affected by the emergency, evacuation orders, detailed descriptions of areas to be evacuated, specific evacuation routes, approved shelters or the way to take shelter in one's home, instructions on how to secure personal property, road closures, and how to obtain relief assistance.'' Must the information provided aurally be verbatim to the text provided to comply with this directive? Should the emergency information provided aurally be abbreviated where the information presented textually is particularly lengthy, for example, where it lists many school district closings in the viewing area? Given the potential use of the secondary audio stream for both emergency information and video description, how can we ensure that video description is not unduly interrupted? Should we require covered entities to repeat the aural version of emergency information on the secondary audio stream or take some other action to ensure that consumers have sufficient time to tune in after hearing the required aural tones? Is visual but non-textual emergency information—such as a map showing the path of a storm—sometimes provided during programming that is not a newscast? Are such visual displays (*e.g.,* maps) always accompanied by a crawl or scroll containing a textual version of the emergency information conveyed by that visual display? What requirements should apply to the aural description of visual but non-textual emergency information?

14. The Commission's rules currently prohibit emergency information from blocking video description, and they prohibit video description from blocking emergency information provided by means other than video description. 47 CFR 79.2(b)(3)(ii). The VPAAC recommends eliminating the portion of this rule that prohibits emergency information from blocking video description, given their recommendation that ''emergency information conveyed visually by crawl or scroll also be conveyed aurally utilizing the same audio stream as the video description audio stream.'' The VPAAC recommends that § 79.2(b)(3)(ii) be amended to read as follows: ''Any video description provided should not block any emergency information provided by video description or by means other than video description.'' We propose that this be simplified to read as follows: ''Any video description provided should not block any emergency information.'' We seek comment on this proposal. Should this proposal be expanded to require such aural emergency information to supersede any content that may be present on the secondary audio stream (*e.g.,* video description, Spanish or other languages, a duplicate of the main audio, or silence)?

15. Do the proposed revisions to the emergency information requirements necessitate any revisions to FCC Form 2000C, the disability access complaint form, or the existing complaint procedures contained in § 79.2(c) of our rules? If so, what revisions are needed?

16. We also seek comment on the roles of the various entities listed in section 202. That provision mandates that we ''require video programming providers and video programming distributors (as those terms are defined in section 79.1 of title 47, Code of Federal Regulations) and program owners to convey such emergency information in a manner accessible to individuals who are blind or visually impaired.'' 47 U.S.C. 613(g)(2). Section 79.1 of our rules defines a ''video programming distributor'' as ''[a]ny television broadcast station licensed by the Commission and any multichannel video programming distributor as defined in § 76.1000(e) of this chapter, and any other distributor of video programming for residential reception that delivers such programming directly to the home and is subject to the jurisdiction of the Commission.'' 47 CFR 79.1(a)(2). That section defines a ''video programming provider'' as ''[a]ny video programming distributor and any other entity that provides video programming that is intended for distribution to residential households including, but not limited to broadcast or nonbroadcast television network and the owners of such programming.'' 47 CFR 79.1(a)(3). Section 79.2 of the Commission's rules currently imposes emergency information accessibility requirements on video programming distributors only, but section 202(a) of the CVAA requires us to promulgate regulations containing requirements for video programming providers and program owners as well as video programming distributors. 47 U.S.C. 613(g)(2). What role should video programming distributors, video programming providers, and program owners play in ensuring that emergency information is conveyed in an accessible manner? Should video programming distributors hold the primary responsibility, with video programming providers and program owners being prohibited from interfering with or hindering a video programming distributor's provision of accessible emergency information? Or, are there certain responsibilities that should be allocated to each of the covered entities? What entity is generally responsible for preparing a crawl or scroll containing emergency information, and how does that responsibility affect the obligation to provide an aural version of the information?

17. As noted, § 79.1 of the Commission's rules includes definitions for the terms ''video programming provider'' and ''video programming distributor,'' but it does not define ''program owner.'' *See* 47 CFR 79.1(a)(2)–(3). The definition of ''video programming provider'' does, however, include a ''broadcast or nonbroadcast television network and the owners of such programming.'' 47 CFR 79.1(a)(3). We seek comment on whether it is necessary to separately define a video programming owner in the present context. In the context of closed captioning of IP-delivered video programming, the Commission defined a video programming owner as ''any person or entity that either (i) licenses the video programming to a video programming distributor or provider that makes the video programming available directly to the end user through a distribution method that uses Internet protocol; or (ii) acts as the video programming distributor or provider, and also possesses the right to license the video programming to a video programming distributor or provider that makes the video programming available directly to the end user through a distribution method that uses Internet protocol.'' *Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010,* Report and Order, 77 FR 19480 (2012) (''*IP Closed Captioning Order*''). Although the references in this definition to ''a distribution method that uses Internet protocol'' are specific to the IP closed captioning proceeding, and thus would not be applicable here, the definition may be useful as a starting

point for purposes of defining ''program owner'' in this context. For example, for purposes of this proceeding, we seek comment on whether we should define a video programming owner as any person or entity that either (i) licenses the video programming to a video programming distributor or provider, as those terms are defined in § 79.1 of the Commission's rules; or (ii) acts as the video programming distributor or provider, and also possesses the right to license the video programming to a video programming distributor or provider, as those terms are defined in § 79.1 of the Commission's rules.

18. The VPAAC identified additional or alternative methods to convey emergency information in a manner accessible to individuals who are blind or visually impaired, other than the use of a secondary audio stream.[13] For example, the VPAAC considered alternatives such as: (1) Including a shortened audio version of the textual emergency information on the primary stream; or (2) broadcasting a 5 to 10 second audio message after the three high-pitched tones announcing the start of a textual message, to inform individuals who are blind or visually impaired of a means by which they could access the emergency information, such as a telephone number or radio station. According to the VPAAC, these alternatives could be used in concert with each other, but they would have disadvantages, including interruption to the main program audio and the need for sufficient resources to create and manage the brief audio messages. Should we require (on an interim basis) or permit covered entities to use one or more of these alternative approaches in concert with the use of the secondary audio stream that we propose above? The VPAAC also considered and rejected other alternatives that it determined either did not meet the requirements of the CVAA, relied upon technology or services that are not widely available, or involved additional problems.[14] We invite comment on whether the alternatives rejected by VPAAC merit further consideration. We ask commenters to identify any other alternative methods by which video programming providers and distributors and program owners can make emergency information accessible to individuals who are blind or visually impaired. Are any such alternatives preferable to our proposal, which requires the use of a secondary audio stream? How would the costs and benefits of any alternate proposals compare to the costs and benefits of the proposed use of the secondary audio stream discussed herein?

B. Apparatus Requirements for Emergency Information and Video Description

19. Pursuant to section 203 of the CVAA, the Commission must require certain apparatus to have the capability to decode and make available required video description services and emergency information in a manner accessible to individuals who are blind or visually impaired. 47 U.S.C. 303(u), (z), 330(b). The Commission must prescribe these requirements by October 9, 2013. The regulations promulgated as part of the current proceeding must include ''any technical standards, protocols, and procedures needed for the transmission of'' video description and emergency information. Public Law 111–260, § 203(d). Below we seek comment on requirements for apparatus with regard to video description and emergency information. Our section 203 discussion focuses on the availability of secondary audio streams, because that is both the current mechanism for providing video description and our proposed mechanism for making emergency information accessible.

1. Requirements for Apparatus Subject to Section 203 of the CVAA

20. Pursuant to section 203 of the CVAA, ''apparatus designed to receive or play back video programming transmitted simultaneously with sound, if such apparatus is manufactured in the United States or imported for use in the United States and uses a picture screen of any size,'' must ''have the capability to decode and make available the transmission and delivery of'' required video description services. 47 U.S.C. 303(u)(1)(B). Such apparatus must also ''have the capability to decode and make available emergency information * * * in a manner that is accessible to individuals who are blind or visually impaired.'' 47 U.S.C. 303(u)(1)(C). We seek comment on the meaning of these requirements. What specific capabilities should the Commission mandate? What steps must manufacturers of covered apparatus take to ensure that video description services and emergency information provided via a secondary audio stream are available and accessible? How should we balance the costs of compliance for apparatus subject to section 203 of the CVAA and the benefits to consumers? With respect to MVPD-provided apparatus, should we impose different requirements on equipment provided by different types of MVPDs? For example, the House Committee Report indicated that DBS providers may face unique technical challenges pertaining to compliance with section 203 of the CVAA. We seek comment on whether apparatus should have the capability to make textual emergency information audible through the use of text-to-speech, consistent with our discussion above in paragraph 12 or whether there are any other specific capabilities that apparatus would need to include to comply with these requirements beyond the ability to select and decode a secondary audio stream. If so, should we require broadcasters and MVPDs to make the textual emergency information available to apparatus?

21. We also seek comment on the requirements for recording devices, namely, that ''apparatus designed to record video programming transmitted simultaneously with sound * * * enable the rendering or the pass through of * * * video description signals, and emergency information * * * such that viewers are able to activate and de-activate the * * * video description as the video programming is played back on a picture screen of any size.'' 47 U.S.C. 303(z)(1). What should we require of recording devices to ''enable the rendering or the pass through of'' video description and emergency information? We seek comment on the benefits and incremental costs to ensuring that video description and accessible emergency information, when provided as proposed on the secondary audio stream, are recorded and can be activated or de-activated when played back. How do requirements relating to emergency information apply to recording devices, given that emergency information is, by its nature, extremely time sensitive? How should we expect recording devices to ensure that the secondary audio stream is stored along with the associated video, such that a consumer may switch between the main program audio and the secondary audio stream when viewing recorded programming?

22. The Commission's rules must ''provide performance and display standards for * * * the transmission and delivery of video description

[13] The CVAA requires us to ''identify methods to convey emergency information * * * in a manner accessible to individuals who are blind or visually impaired.'' 47 U.S.C. 613(g)(1).

[14] The VPAAC rejected the following alternatives: (1) ''dipping'' or lowering the main program audio and playing an aural message over the lowered audio; (2) providing screen reader software or devices on request; (3) enabling users to select and enlarge emergency crawl text; (4) providing guidance for consumers, such as how to switch to a secondary audio channel, which is insufficient as a standalone solution; and (5) using an Internet-based standardized application to filter emergency information by location.

services, and the conveyance of emergency information as required * * * .'' 47 U.S.C. 330(b). We seek comment on what performance and display standards we should impose for the transmission and delivery of video description and emergency information. We also seek comment on the VPAAC's suggestion that, when video description, alternate language audio, and emergency information are not available on a secondary audio channel, best efforts should be taken to ensure that the channel contains the main program audio rather than silence. Such an approach would enable consumers to tune to their secondary audio stream all of the time, instead of needing to switch back and forth depending on whether video description is available for a particular program or emergency information is being provided. Should we impose this as a requirement, or recommend it as a best practice?

23. Section 203 of the CVAA directs the Commission to require that ''interconnection mechanisms and standards for digital video source devices are available to carry from the source device to the consumer equipment the information necessary to permit or render the display of closed captions and to make encoded video description and emergency information audible.'' 47 U.S.C. 303(z)(2). It is our understanding that most, if not all, devices already use interconnection mechanisms that make available audio provided via a secondary audio stream. Thus, we do not believe that any further steps are necessary to implement this requirement. We seek comment on our understanding.

24. We seek comment on three issues that arose in the 2011 video description proceeding that may be relevant here. They pertain to equipment features that present challenges for video programming distributors and consumers. First, the *2011 Video Description Order* observed that ''viewers with digital sets may be unable to find and activate an audio stream that has been properly labeled 'VI' ('Visually Impaired') pursuant to the ATSC standard,'' so the audio stream used for video description must be labeled as ''CM'' (''complete main'') for the system to work properly. Further, some television receivers do not handle two audio tracks identified as English properly, and thus to ensure compatibility, broadcasters often tag the video description stream as a foreign language. That is, rather than conveying metadata that indicates the audio stream is an English track for the visually impaired (VI-English), broadcasters convey metadata that the service is a ''complete main'' audio stream in a foreign language (typically CM-Spanish or CM-Portuguese) in order to provide a tag for the stream. In 2011, the Commission decided that this issue would be better addressed in a later proceeding. The VPAAC recognizes that there is a ''need for a more user-friendly mechanism to allow the carriage of multiple audio services,'' but it does not identify a timeframe for such a mechanism. We seek comment on whether the Commission should impose a requirement at this time that broadcast receivers detect and decode tracks marked for the ''visually impaired.'' How would consumers who have not upgraded their equipment be affected by such a requirement? How can we minimize any confusion or cost to such consumers? How can we mitigate the need for consumers to purchase new equipment to take advantage of the requirements proposed herein? Do the issues discussed in this paragraph pertain to MVPDs as well as broadcasters?

25. Second, Dolby Laboratories, Inc. commented that the audio experience for individuals accessing video-described programming could be enhanced if devices supported a ''receiver-mix'' technology that would enable the device to combine the full surround sound main audio with video description. Although it is technically possible for broadcasters and some MVPDs to provide two full surround channels, the additional bandwidth required to do so could pose a hardship for those entities. In the *2011 Video Description Order,* the Commission determined that this issue would also be better addressed in a later proceeding. We invite comment on whether any action should be taken on this issue at this time.

26. Third, although the ATSC standard for digital television broadcasting enables the use of multiple audio streams (including, for example, the concurrent use of a main audio stream, a secondary video description stream, and a third stream containing Spanish or other foreign language audio), it is our understanding that few, if any, broadcasters or MVPDs provide more than two audio streams, and few devices are able to accommodate more than two audio streams. The *2011 Video Description Order* noted that equipment limitations may prohibit some viewers from being able to access a third audio channel even if one were to be provided by a video programming distributor. Although we do not propose to require video programming distributors to carry more than one additional audio channel at this time, we are concerned that equipment limitations may be discouraging video programming distributors from doing so voluntarily. We seek comment on the suggestion of consumer members of the VPAAC that we ''consider how best to facilitate a transition * * * to deliver multiple simultaneous ancillary audio services, so that both Spanish (or other alternate languages) and video description could be provided for the same program.'' Although industry members of the VPAAC concluded that we do not need a single format, protocol, or standard for multiple audio services, we note the existence of what is known as ''CEA–CEB21,'' *Recommended Practice for Selection and Presentation of DTV Audio,* a bulletin that ''provides recommendations to manufacturers to facilitate user setup of audio features in the receiver without professional assistance.'' [15] The VPAAC stated that consumer receiving devices could be built in accordance with the recommendations contained in CEA–CEB21. Is this a solution that the Commission should mandate? We seek comment on the costs associated with building a device in compliance with this bulletin, as well as any drawbacks to doing so. Would the benefits of building a device in compliance with CEA–CEB21 outweigh the costs? Are there other industry guidelines that could facilitate compatibility between apparatus and covered services containing multiple audio streams? If we require apparatus to comply with the recommendations contained in CEA–CEB21, are there corresponding requirements that we should impose on broadcasters and MVPDs, and if so, what?

27. We invite comment on the appropriate deadline by which we should require apparatus to meet the requirements that we adopt as part of this proceeding. We note that the Commission has previously imposed a two-year deadline for apparatus requirements, for example, in the *IP Closed Captioning Order.* We ask commenters to justify any deadline they propose by explaining what must be done by that deadline to comply with the new requirements. Should we consider here the argument made by the Consumer Electronics Association (''CEA'') in a pending petition for reconsideration of the *IP Closed Captioning Order* that the compliance deadline should be interpreted to refer

[15] CEA–CEB21, *Recommended Practice for Selection and Presentation of DTV Audio,* June 2011, *available at http://www.ce.org/Standards/Standard-Listings/R4-3-Television-Data-Systems-Subcommittee/CEA-CEB21.aspx.*

only to the date of manufacture, and not to the date of importation?

28. In order to address any failures to comply with the new requirements after the established deadline, we propose imposing complaint procedures comparable to those adopted for apparatus complaints in the *IP Closed Captioning Order.* As a preliminary matter, we seek comment on whether the Commission should require MVPDs that provide set-top boxes to provide customer support services to assist consumers who are blind or visually impaired to navigate between the main and secondary audio streams to access video description and accessible emergency information. Would such a requirement help fulfill the CVAA's mandate that apparatus have the capability to decode and make available video description and accessible emergency information, *e.g.,* does the use of the term ''make available'' in the statute reasonably encompass more than simply apparatus functionality? 47 U.S.C. 303(u)(1)(B) and (C). Would such requirements benefit consumers and industry by encouraging the resolution rather than the filing of consumer complaints? Would consumers and industry benefit from the provision and publication of contact information for resolution of consumer concerns, such as we require in our closed captioning rules? *See* 47 CFR 79.1(i). How should the Commission evaluate the potential benefits of a customer support requirement and the incremental costs, which we expect would be relatively minimal to the extent that a company already provides customer support services? What else can be done to make legacy equipment more accessible to and available to individuals with visual disabilities?

29. With respect to the filing of complaints, we propose that complaints alleging a violation should include: (a) The name, postal address, and other contact information of the complainant, such as telephone number or email address; (b) the name and contact information, such as postal address, of the apparatus manufacturer or provider; (c) information sufficient to identify the software or device used to view or to attempt to view video programming with video description or emergency information; (d) the date or dates on which the complainant purchased, acquired, or used, or tried to purchase, acquire, or use the apparatus to view video programming with video description or emergency information; (e) a statement of facts sufficient to show that the manufacturer or provider has violated or is violating the Commission's rules; (f) the specific relief or satisfaction sought by the complainant; and (g) the complainant's preferred format or method of response to the complaint. In addition, we propose that a complaint alleging a violation of the apparatus rules related to emergency information and video description may be transmitted to the Consumer and Governmental Affairs Bureau by any reasonable means, such as the Commission's online informal complaint filing system, letter in writing or Braille, facsimile transmission, telephone (voice/TRS/TTY), email, or some other method that would best accommodate the complainant's disability. Given that the population intended to benefit from the rules adopted will be blind or visually impaired, we also note that, if a complainant calls the Commission for assistance in preparing a complaint, Commission staff will document the complaint in writing for the consumer and such communication will be deemed to be a written complaint. We also propose that the Commission will forward such complaints, as appropriate, to the named manufacturer or provider for its response, as well as to any other entity that Commission staff determines may be involved, and that the Commission be permitted to request additional information from any relevant parties when, in the estimation of Commission staff, such information is needed to investigate the complaint or adjudicate potential violations of Commission rules. Do the proposed requirements for apparatus related to video description and emergency information necessitate any revisions to FCC Form 2000C, the disability access complaint form, and if so, what revisions are needed?

2. Apparatus Subject to Section 203 of the CVAA

30. In this section, we discuss which apparatus should be subject to the video description and emergency information requirements of section 203 of the CVAA. We propose at this time to apply the video description and emergency information requirements of section 203 of the CVAA only to apparatus designed to receive, play back, or record television broadcast services or MVPD services. In other words, for purposes of this proceeding, we propose to limit the scope of the apparatus rules that the Commission will adopt in this proceeding to apparatus that make available the type of programming that is subject to our existing emergency information rules, as set forth in § 79.2 of our rules, and our existing video description rules, as set forth in § 79.3 of our rules. Accordingly, we propose that the apparatus requirements discussed herein would not be triggered by apparatus' display of IP-delivered video programming that is not part of a television broadcast service or MVPD service. We believe this is appropriate given that the current video description and emergency information rules will continue to apply to television broadcast services and MVPD services. We invite comment on this proposal and analysis. How should this proposal apply to different types of apparatus, for example, to tablet devices that enable users to view television programming as part of an MVPD service? Under this proposal, how would the new requirements we adopt in this proceeding apply to apparatus beyond conventional television equipment, such as televisions and cable boxes, to devices such as video game consoles (*e.g.,* Xbox) to the extent an MVPD enables its subscribers to access its MVPD service through those devices?

31. In the *IP Closed Captioning Order,* the Commission concluded that the scope of ''apparatus designed to receive or play back video programming transmitted simultaneously with sound'' covered by section 203 includes physical devices designed to receive or play back video programming, as well as software integrated in those covered devices. We propose that the term ''apparatus'' as used in this proceeding similarly extend to physical devices designed to receive, play back, or record television broadcast or MVPD service video programming as well as integrated software, and we seek comment on that proposal.

32. The Commission also found in the *IP Closed Captioning Order* that an apparatus is ''designed to receive or play back video programming transmitted simultaneously with sound'' if a device is sold with, or updated by the manufacturer to add, an integrated video player capable of displaying video programming.[16] The Commission concluded further that, if apparatus uses

[16] We note that a pending petition for reconsideration of the *IP Closed Captioning Order* seeks a Commission determination that the scope of the apparatus requirements adopted in that proceeding pursuant to section 203 of the CVAA should apply only to apparatus that include ''video programming'' players, as that term is defined in the CVAA, and not more broadly to any apparatus that include a ''video player.'' *See* Petition for Reconsideration of the Consumer Electronics Association, MB Docket No. 11–154, at 3–5 (filed Apr. 30, 2012) (''CEA Recon. Petition''). The CEA Recon. Petition also argues that the Commission misinterpreted the phrase ''designed to,'' claiming that the phrase instead refers to the subjective intent of the manufacturer rather than the objective fact that the product was designed with this capability. *Id.* at 5–8. The CEA Recon. Petition remains pending before the Commission.

a picture screen of any size, that means that the apparatus works in conjunction with a picture screen. In the *IP Closed Captioning Order,* the Commission also addressed the meaning of the term ''technically feasible,'' and concluded that if something is technically infeasible, it is not merely difficult, but rather is physically or technically impossible.

33. We propose to apply the interpretation of ''technically feasible,'' ''designed to receive or play back video programming transmitted simultaneously with sound,'' and ''uses a picture screen of any size'' from the *IP Closed Captioning Order* to the present video description and emergency information context. We seek comment on this proposal. We note that the *IP Closed Captioning Order* interpreted the same provisions of section 203 of the CVAA that are at issue in this proceeding, and accordingly, we see no basis to deviate from the Commission's carefully considered prior interpretations of ''technically feasible,'' ''designed to receive or play back video programming transmitted simultaneously with sound,'' or ''uses a picture screen of any size.'' We note, however, that unlike the IP closed captioning context, we propose to apply the rules in this context, as discussed above, only to apparatus designed to receive, play back, or record television broadcast services or MVPD services. As in the *IP Closed Captioning Order,* we propose to permit parties to raise technical infeasibility as a defense to a complaint or, alternatively, to file a request for a ruling under § 1.41 of the Commission's rules before manufacturing or importing the product, and we invite comment on this proposal.

34. Consistent with the *IP Closed Captioning Order,* we propose to include removable media play back apparatus, such as DVD and Blu-ray players, within the scope of the new requirements, but only to the extent that they receive, play back, or record television broadcast services or MVPD services.[17] We seek comment on whether this proposal is the best reading of the statute. We also propose excluding commercial video equipment, including professional movie theater projectors and similar types of professional equipment. We propose this exclusion because we believe that a typical consumer would not view televised video programming via a professional movie theater projector or similar professional equipment.[18] We invite comments on the costs and benefits of our proposal to include removable media players within the scope of the new requirements while excluding commercial video equipment. Should we require only video description, and not emergency information, to be accessible via removable media players, since generally we expect that emergency information will no longer be pertinent at the time consumers play back video programming on removable media players? Or, might consumers wish to preserve the emergency information, such as information about shelter locations, school closings, or alternative evacuation routes on removable media—in which case, our rules should cover those devices as well? If removable media play back apparatus are made capable of playing back a secondary audio stream with video description, would they necessarily also be capable of playing back emergency information on a secondary audio stream? Would removable media apparatus be capable of distinguishing between or providing video description but not emergency information?

3. Achievability, Display-Only Monitors, and Purpose-Based Waivers

35. Section 203 of the CVAA creates and authorizes exceptions for certain categories of apparatus that otherwise would be subject to the section 203 requirements. Public Law 111–260, section 203(a)–(b). Specifically, section 203 provides that certain apparatus must meet the requirements of that section only if ''achievable,'' as that word is defined in section 716 of the Act.[19] The achievability exception applies to apparatus ''that use a picture screen that is less than 13 inches in size.'' 47 U.S.C. 303(u)(2)(A). The achievability exception also applies to ''apparatus designed to record video programming transmitted simultaneously with sound.''[20] 47 U.S.C. 303(z)(1). Section 203 also states that ''any apparatus or class of apparatus that are display-only video monitors with no playback capability are exempt from the requirements * * *.'' 47 U.S.C. 303(u)(2)(B). Further, section 203 permits the Commission ''on its own motion or in response to a petition by a manufacturer, to waive the requirements * * * for any apparatus or class of apparatus primarily designed for activities other than receiving or playing back video programming transmitted simultaneously with sound; or for equipment designed for multiple purposes, capable of receiving or playing video programming transmitted simultaneously with sound but whose essential utility is derived from other purposes.'' 47 U.S.C. 303(u)(2)(C).

36. We propose to model the scope of these exceptions on the *IP Closed Captioning Order,* in which the Commission evaluated each of these exceptions. Regarding achievability, the Commission adopted a flexible approach by which a manufacturer may raise achievability as a defense to a complaint alleging a violation of section 203, or it may seek a determination of achievability from the Commission before manufacturing or importing the apparatus.[21] The Commission found that the exemption for display-only video monitors is self-explanatory and thus incorporated the language of the statutory provision directly into its rules, and the Commission also provided that a manufacturer may make a request for a Commission determination as to whether its device

[17] We note that the CEA Recon. Petition argues that the Commission should not treat removable media players as apparatus covered by the captioning rules. *See* CEA Recon. Petition at 8–18.

[18] Additionally, the legislative history of the CVAA explains that section 203(a) was intended to ''ensure[] that devices *consumers use* to view video programming are able to * * * decode, and make available the transmission of video description services, and decode and make available emergency information.'' *See* House Committee Report at 30 (emphasis added); Senate Committee Report at 14 (emphasis added). We therefore believe that Congress intended the Commission's regulations to cover apparatus that are used by consumers, which would not include professional or commercial equipment.

[19] Section 716 of the Communications Act of 1934, as amended (the ''Act''), defines ''achievable'' as ''with reasonable effort or expense, as determined by the Commission,'' and it directs the Commission to consider the following factors in determining whether the requirements of a provision are achievable: ''(1) The nature and cost of the steps needed to meet the requirements of this section with respect to the specific equipment or service in question. (2) The technical and economic impact on the operation of the manufacturer or provider and on the operation of the specific equipment or service in question, including on the development and deployment of new communications technologies. (3) The type of operations of the manufacturer or provider. (4) The extent to which the service provider or manufacturer in question offers accessible services or equipment containing varying degrees of functionality and features, and offered at differing price points.'' 47 U.S.C. 617(g).

[20] Similar to the Commission's reasoning in the *IP Closed Captioning Order,* here ''we expect identifying apparatus designed to record to be straightforward,'' and we propose that ''when devices such as DVD, Blu-ray, and other removable media recording devices are capable of recording video programming, they also qualify as recording devices under Section 203(b) and therefore'' are subject to the requirements that the CVAA imposes on recording devices. We invite comment on this interpretation.

[21] If a manufacturer seeks a Commission determination of achievability before manufacturing or importing an apparatus, it would make such a request pursuant to § 1.41 of the Commission's rules. *See* 47 CFR 1.41.

qualifies for this exemption.[22] As for purpose-based waivers, another type of exception permitted by the statute, the Commission concluded that it would address any such waiver requests on a case-by-case basis, and it stated that waivers would be available prospectively for manufacturers seeking certainty prior to the sale of a device.[23] What impact, if any, would the proposed scope of our rules in this proceeding, if adopted, have on the need for such waivers? We seek comment on whether the scope of these exceptions as adopted in the *IP Closed Captioning Order* should govern in the present context. Is there any reason to deviate from the Commission's previous interpretation of these exceptions?

4. Alternate Means of Compliance

37. We propose to implement here the same approach to alternate means of compliance that we adopted in the *IP Closed Captioning Order.* As set forth in section 203 of the CVAA, ''[a]n entity may meet the requirements of sections 303(u), 303(z), and 330(b) of [the Act] through alternate means than those prescribed by regulations pursuant to subsection (d) if the requirements of those sections are met, as determined by the Commission.'' Public Law 111–260, section 203(e). We propose that, should an entity seek to use an ''alternate means'' to comply with the requirements for apparatus with regard to video description and emergency information, that entity could either (i) request a Commission determination that the proposed alternate means satisfies the statutory requirements through a request pursuant to § 1.41 of our rules, 47 CFR 1.41; or (ii) claim in defense to a complaint or enforcement action that the Commission should determine that the party's actions were permissible alternate means of compliance. Rather than specify what may constitute a permissible ''alternate means,'' we propose to address any specific requests from parties subject to the new rules when they are presented to us. We seek comment on these proposals. Alternatively, given the nature of emergency information, should we impose certain standards that any permissible alternate means must meet?

[22] A manufacturer would make such a request pursuant to § 1.41 of the Commission's rules. *See* 47 CFR 1.41.

[23] The Commission also quoted the House and Senate Committee Reports, which state that a waiver under these provisions is available ''where, for instance, a consumer typically purchases a product for a primary purpose other than viewing video programming, and access to such programming is provided on an incidental basis.'' *See* House Committee Report at 30; Senate Committee Report at 14. Waiver of the Commission's rules is also subject to our general waiver standard, which requires good cause and a showing that particular facts make compliance inconsistent with the public interest. 47 CFR 1.3.

IV. Procedural Matters

A. Initial Regulatory Flexibility Act Analysis

38. As required by the Regulatory Flexibility Act of 1980, as amended (''RFA''), *see* 5 U.S.C. 603, the Commission has prepared this present Initial Regulatory Flexibility Analysis (''IRFA'') concerning the possible significant economic impact on small entities by the policies and rules proposed in the *Notice of Proposed Rulemaking* (''*NPRM*''). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments provided on the first page of the *NPRM.* The Commission will send a copy of the *NPRM,* including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (''SBA''). *See* 5 U.S.C. 603(a). In addition, the *NPRM* and IRFA (or summaries thereof) will be published in the **Federal Register**.

1. Need for, and Objectives of, the Proposed Rule Changes

39. The Federal Communications Commission (''Commission'') initiates this proceeding to implement the provisions of the Twenty-First Century Communications and Video Accessibility Act of 2010 (''CVAA'') requiring that emergency information be made accessible to individuals who are blind or visually impaired and that certain equipment be capable of delivering video description and emergency information to those individuals. First, pursuant to section 202 of the CVAA, the *NPRM* proposes to make televised emergency information more accessible to individuals who are blind or visually impaired by requiring the use of a secondary audio stream to provide emergency information aurally that is conveyed visually during programming other than newscasts. Second, the *NPRM* seeks comment under section 203 of the CVAA on how to ensure that television apparatus are able to make available video description, as well as to make emergency information accessible to individuals who are blind or visually impaired. Our section 203 discussion focuses on the availability of secondary audio streams, because that is both the mechanism for providing video description and our proposed mechanism for making emergency information accessible. The *NPRM* proposes at this time to apply the video description and emergency information requirements of section 203 of the CVAA only to apparatus designed to receive, play back, or record television broadcast services or MVPD services. Our goal in this proceeding is to enable individuals who are blind or visually impaired to access emergency information and video description services more easily. The proposed revisions to our rules will help fulfill the purpose of the CVAA to ''update the communications laws to help ensure that individuals with disabilities are able to fully utilize communications services and equipment and better access video programming.''

2. Legal Basis

40. The proposed action is authorized pursuant to the Twenty-First Century Communications and Video Accessibility Act of 2010, Public Law 111–260, 124 Stat. 2751, and the authority found in sections 4(i), 4(j), 303(u) and (z), 330(b), and 713(g), of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 154(j), 303(u) and (z), 330(b), and 613(g).

3. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

41. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted. The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act. A small business concern is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA. Below, we provide a description of such small entities, as well as an estimate of the number of such small entities, where feasible.

42. *Cable Television Distribution Services.* Since 2007, these services have been defined within the broad economic census category of ''Wired Telecommunications Carriers,'' which is defined as follows: ''This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks.

Transmission facilities may be based on a single technology or a combination of technologies.'' The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. Census data for 2007 shows that there were 31,996 establishments that operated that year. Of those 31,996, 1,818 operated with more than 100 employees, and 30,178 operated with fewer than 100 employees. Thus, under this category and the associated small business size standard, the majority of such firms can be considered small.

43. *Cable Companies and Systems.* The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission's rules, a ''small cable company'' is one serving 400,000 or fewer subscribers, nationwide. Industry data indicate that, of 1,076 cable operators nationwide, all but eleven are small under this size standard. In addition, under the Commission's rules, a ''small system'' is a cable system serving 15,000 or fewer subscribers. Industry data indicate that, of 6,635 systems nationwide, 5,802 systems have under 10,000 subscribers, and an additional 302 systems have 10,000–19,999 subscribers. Thus, under this second size standard, most cable systems are small.

44. *Cable System Operators.* The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is ''a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000.'' The Commission has determined that an operator serving fewer than 677,000 subscribers shall be deemed a small operator if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate. Industry data indicate that all but nine cable operators nationwide are small under this subscriber size standard. We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million, and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

45. *Television Broadcasting.* This Economic Census category ''comprises establishments primarily engaged in broadcasting images together with sound. These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public.'' The SBA has created the following small business size standard for Television Broadcasting firms: those having $14 million or less in annual receipts. The Commission has estimated the number of licensed commercial television stations to be 1,387. In addition, according to Commission staff review of the BIA Advisory Services, LLC's *Media Access Pro Television Database* on March 28, 2012, about 950 of an estimated 1,300 commercial television stations (or approximately 73 percent) had revenues of $14 million or less. We therefore estimate that the majority of commercial television broadcasters are small entities.

46. We note, however, that in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. In addition, an element of the definition of ''small business'' is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply does not exclude any television station from the definition of a small business on this basis and is therefore possibly over-inclusive to that extent.

47. In addition, the Commission has estimated the number of licensed noncommercial educational (NCE) television stations to be 396. These stations are non-profit, and therefore considered to be small entities.

48. *Direct Broadcast Satellite (''DBS'') Service.* DBS service is a nationally distributed subscription service that delivers video and audio programming via satellite to a small parabolic ''dish'' antenna at the subscriber's location. DBS, by exception, is now included in the SBA's broad economic census category, ''Wired Telecommunications Carriers,'' which was developed for small wireline firms. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees. Census data for 2007 shows that there were 31,996 establishments that operated that year. Of those 31,996, 1,818 operated with more than 100 employees, and 30,178 operated with fewer than 100 employees. Thus, under this category and the associated small business size standard, the majority of such firms can be considered small. Currently, only two entities provide DBS service, which requires a great investment of capital for operation: DIRECTV and EchoStar Communications Corporation (''EchoStar'') (marketed as the DISH Network). Each currently offers subscription services. DIRECTV and EchoStar each report annual revenues that are in excess of the threshold for a small business. Because DBS service requires significant capital, we believe it is unlikely that a small entity as defined by the SBA would have the financial wherewithal to become a DBS service provider.

49. *Satellite Telecommunications Providers.* Two economic census categories address the satellite industry. The first category has a small business size standard of $15 million or less in average annual receipts, under SBA rules. The second has a size standard of $25 million or less in annual receipts.

50. The category of ''Satellite Telecommunications'' ''comprises establishments primarily engaged in providing telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications.'' Census Bureau data for 2007 show that 607 Satellite Telecommunications establishments operated for that entire year. Of this total, 533 establishments had annual receipts of under $10 million or less, and 74 establishments had receipts of $10 million or more. Consequently, the Commission estimates that the majority of Satellite Telecommunications firms are small entities that might be affected by our action.

51. The second category, *i.e.,* ''All Other Telecommunications,'' comprises ''establishments primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems. Establishments providing Internet services or voice over Internet protocol (VoIP) services via client-supplied telecommunications connections are also included in this industry.'' For this category, Census data for 2007 shows that there were a

total of 2,639 establishments that operated for the entire year. Of those 2,639 establishments, 2,333 operated with annual receipts of less than $10 million and 306 with annual receipts of $10 million or more. Consequently, the Commission estimates that a majority of All Other Telecommunications establishments are small entities that might be affected by our action.

52. *Satellite Master Antenna Television (SMATV) Systems, also known as Private Cable Operators (PCOs).* SMATV systems or PCOs are video distribution facilities that use closed transmission paths without using any public right-of-way. They acquire video programming and distribute it via terrestrial wiring in urban and suburban multiple dwelling units such as apartments and condominiums, and commercial multiple tenant units such as hotels and office buildings. SMATV systems or PCOs are now included in the SBA's broad economic census category, ''Wired Telecommunications Carriers,'' which was developed for small wireline firms. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees. Census data for 2007 shows that there were 31,996 establishments that operated that year. Of those 31,996, 1,818 operated with more than 100 employees, and 30,178 operated with fewer than 100 employees. Thus, under this category and the associated small business size standard, the majority of such firms can be considered small.

53. *Home Satellite Dish (''HSD'') Service.* HSD or the large dish segment of the satellite industry is the original satellite-to-home service offered to consumers, and involves the home reception of signals transmitted by satellites operating generally in the C-band frequency. Unlike DBS, which uses small dishes, HSD antennas are between four and eight feet in diameter and can receive a wide range of unscrambled (free) programming and scrambled programming purchased from program packagers that are licensed to facilitate subscribers' receipt of video programming. Because HSD provides subscription services, HSD falls within the SBA-recognized definition of ''Wired Telecommunications Carriers.'' The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. Census data for 2007 shows that there were 31,996 establishments that operated that year. Of those 31,996, 1,818 operated with more than 100 employees, and 30,178 operated with fewer than 100 employees. Thus, under this category and the associated small business size standard, the majority of such firms can be considered small.

54. *Broadband Radio Service and Educational Broadband Service.* Broadband Radio Service systems, previously referred to as Multipoint Distribution Service (MDS) and Multichannel Multipoint Distribution Service (MMDS) systems, and ''wireless cable,'' transmit video programming to subscribers and provide two-way high speed data operations using the microwave frequencies of the Broadband Radio Service (BRS) and Educational Broadband Service (EBS) (previously referred to as the Instructional Television Fixed Service (ITFS)). In connection with the 1996 BRS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of no more than $40 million in the previous three calendar years. The BRS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 met the definition of a small business. BRS also includes licensees of stations authorized prior to the auction. At this time, we estimate that of the 61 small business BRS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent BRS licensees that are considered small entities. After adding the number of small business auction licensees to the number of incumbent licensees not already counted, we find that there are currently approximately 440 BRS licensees that are defined as small businesses under either the SBA or the Commission's rules. In 2009, the Commission conducted Auction 86, the sale of 78 licenses in the BRS areas. The Commission offered three levels of bidding credits: (i) A bidder with attributed average annual gross revenues that exceed $15 million and do not exceed $40 million for the preceding three years (small business) received a 15 percent discount on its winning bid; (ii) a bidder with attributed average annual gross revenues that exceed $3 million and do not exceed $15 million for the preceding three years (very small business) received a 25 percent discount on its winning bid; and (iii) a bidder with attributed average annual gross revenues that do not exceed $3 million for the preceding three years (entrepreneur) received a 35 percent discount on its winning bid. Auction 86 concluded in 2009 with the sale of 61 licenses. Of the ten winning bidders, two bidders that claimed small business status won four licenses; one bidder that claimed very small business status won three licenses; and two bidders that claimed entrepreneur status won six licenses.

55. In addition, the SBA's placement of Cable Television Distribution Services in the category of Wired Telecommunications Carriers is applicable to cable-based Educational Broadcasting Services. Since 2007, ''Wired Telecommunications Carriers'' have been defined as follows: ''This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies.'' Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry. For these services, the Commission uses the SBA small business size standard for Wired Telecommunications Carriers, which is 1,500 or fewer employees. Census data for 2007 shows that there were 31,996 establishments that operated that year. Of those 31,996, 1,818 operated with more than 100 employees, and 30,178 operated with fewer than 100 employees. Thus, under this category and the associated small business size standard, the majority of such firms can be considered small. In addition to Census data, the Commission's internal records indicate that as of September 2012, there are 2,241 active EBS licenses. The Commission estimates that of these 2,241 licenses, the majority are held by non-profit educational institutions and school districts, which are by statute defined as small businesses.

56. *Fixed Microwave Services.* Microwave services include common carrier, private-operational fixed, and broadcast auxiliary radio services. They also include the Local Multipoint Distribution Service (LMDS), the Digital Electronic Message Service (DEMS), and the 24 GHz Service, where licensees can choose between common carrier and non-common carrier status. At present, there are approximately 31,428 common

carrier fixed licensees and 79,732 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. There are approximately 120 LMDS licensees, three DEMS licensees, and three 24 GHz licensees. The Commission has not yet defined a small business with respect to microwave services. For purposes of the IRFA, we will use the SBA's definition applicable to Wireless Telecommunications Carriers (except satellite)—*i.e.,* an entity with no more than 1,500 persons. Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees. For the category of ''Wireless Telecommunications Carriers (except Satellite),'' Census data for 2007 show that there were 11,163 firms that operated for the entire year. Of this total, 10,791 firms had employment of 999 or fewer employees and 372 had employment of 1,000 employees or more. Thus, under this category and the associated small business size standard, the majority of firms can be considered small. We note that the number of firms does not necessarily track the number of licensees. We estimate that virtually all of the Fixed Microwave licensees (excluding broadcast auxiliary licensees) would qualify as small entities under the SBA definition.

57. *Open Video Systems.* The open video system (''OVS'') framework was established in 1996, and is one of four statutorily recognized options for the provision of video programming services by local exchange carriers. The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services, OVS falls within the SBA small business size standard covering cable services, which is ''Wired Telecommunications Carriers.'' The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. Census data for 2007 shows that there were 31,996 establishments that operated that year. Of those 31,996, 1,818 operated with more than 100 employees, and 30,178 operated with fewer than 100 employees. Thus, under this category and the associated small business size standard, the majority of such firms can be considered small. In addition, we note that the Commission has certified some OVS operators, with some now providing service. Broadband service providers (''BSPs'') are currently the only significant holders of OVS certifications or local OVS franchises. The Commission does not have financial or employment information regarding the entities authorized to provide OVS, some of which may not yet be operational. Thus, at least some of the OVS operators may qualify as small entities.

58. *Cable and Other Subscription Programming.* The Census Bureau defines this category as follows: ''This industry comprises establishments primarily engaged in operating studios and facilities for the broadcasting of programs on a subscription or fee basis. These establishments produce programming in their own facilities or acquire programming from external sources. The programming material is usually delivered to a third party, such as cable systems or direct-to-home satellite systems, for transmission to viewers.'' The SBA has developed a small business size standard for this category, which is: all such firms having $15 million dollars or less in annual revenues. To gauge small business prevalence in the Cable and Other Subscription Programming industries, the Commission relies on data currently available from the U.S. Census for the year 2007. Census Bureau data for 2007 show that there were 659 establishments in this category that operated for the entire year. Of that number, 462 operated with annual revenues of $9,999,999 million dollars or less. 197 operated with annual revenues of 10 million or more. Thus, under this category and associated small business size standard, the majority of firms can be considered small.

59. *Small Incumbent Local Exchange Carriers.* We have included small incumbent local exchange carriers in this present RFA analysis. A ''small business'' under the RFA is one that, *inter alia,* meets the pertinent small business size standard (*e.g.,* a telephone communications business having 1,500 or fewer employees), and ''is not dominant in its field of operation.'' The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not ''national'' in scope. We have therefore included small incumbent local exchange carriers in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

60. *Incumbent Local Exchange Carriers (''LECs'').* Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category ''Wired Telecommunications Carriers.'' Under that size standard, such a business is small if it has 1,500 or fewer employees. Census data for 2007 shows that there were 31,996 establishments that operated that year. Of those 31,996, 1,818 operated with more than 100 employees, and 30,178 operated with fewer than 100 employees. Thus, under this category and the associated small business size standard, the majority of such firms can be considered small.

61. *Competitive Local Exchange Carriers, Competitive Access Providers (CAPs), ''Shared-Tenant Service Providers,'' and ''Other Local Service Providers.''* Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category ''Wired Telecommunications Carriers.'' Under that size standard, such a business is small if it has 1,500 or fewer employees. Census data for 2007 shows that there were 31,996 establishments that operated that year. Of those 31,996, 1,818 operated with more than 100 employees, and 30,178 operated with fewer than 100 employees. Thus, under this category and the associated small business size standard, the majority of such firms can be considered small. Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, ''Shared-Tenant Service Providers,'' and ''Other Local Service Providers'' are small entities.

62. *Motion Picture and Video Production.* The Census Bureau defines this category as follows: This industry comprises establishments primarily engaged in producing, or producing and distributing motion pictures, videos, television programs, or television commercials. We note that firms in this category may be engaged in various industries, including cable programming. Specific figures are not available regarding how many of these firms produce and/or distribute programming for cable television. The SBA has developed a small business size standard for this category, which is: all such firms having $29.5 million dollars or less in annual revenues. To gauge small business prevalence in the Motion Picture and Video Production industries, the Commission relies on data currently available from the U.S. Census for the year 2007. Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 9,095 firms in this category that operated for the entire year. Of

these, 8,995 had annual receipts of $24,999,999 or less, and 100 had annual receipts ranging from not less than $25,000,000 to $100,000,000 or more. Thus, under this category and associated small business size standard, the majority of firms can be considered small.

63. *Motion Picture and Video Distribution.* The Census Bureau defines this category as follows: ''This industry comprises establishments primarily engaged in acquiring distribution rights and distributing film and video productions to motion picture theaters, television networks and stations, and exhibitors.'' We note that firms in this category may be engaged in various industries, including cable programming. Specific figures are not available regarding how many of these firms produce and/or distribute programming for cable television. The SBA has developed a small business size standard for this category, which is: All such firms having $29.5 million dollars or less in annual revenues. To gauge small business prevalence in the Motion Picture and Video Distribution industries, the Commission relies on data currently available from the U.S. Census for the year 2007. Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 450 firms in this category that operated for the entire year. Of these, 434 had annual receipts of $24,999,999 or less, and 16 had annual receipts ranging from not less than $25,000,000 to $100,000,000 or more. Thus, under this category and associated small business size standard, the majority of firms can be considered small.

64. *Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing.* The Census Bureau defines this category as follows: ''This industry comprises establishments primarily engaged in manufacturing radio and television broadcast and wireless communications equipment. Examples of products made by these establishments are: transmitting and receiving antennas, cable television equipment, GPS equipment, pagers, cellular phones, mobile communications equipment, and radio and television studio and broadcasting equipment.'' The SBA has developed a small business size standard for Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing, which is: all such firms having 750 or fewer employees. According to Census Bureau data for 2007, there were 919 establishments that operated for part or all of the entire year. Of those 919 establishments, 771 operated with 99 or fewer employees, and 148 operated with 100 or more employees. Thus, under that size standard, the majority of establishments can be considered small.

65. *Audio and Video Equipment Manufacturing.* The SBA has classified the manufacturing of audio and video equipment under in NAICS Codes classification scheme as an industry in which a manufacturer is small if it has less than 750 employees. Data contained in the 2007 Economic Census indicate that 491 establishments in this category operated for part or all of the entire year. Of those 491 establishments, 456 operated with 99 or fewer employees, and 35 operated with 100 or more employees. Thus, under the applicable size standard, a majority of manufacturers of audio and video equipment may be considered small.

4. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

66. Certain proposed rule changes discussed in the *NPRM* would affect reporting, recordkeeping, or other compliance requirements. In general, the *NPRM* proposes to satisfy the requirements of section 202(a) of the CVAA with regard to making emergency information accessible to persons who are blind or visually impaired by mandating the use of a secondary audio stream to provide the emergency information aurally and concurrently with the emergency information being conveyed visually during non-news programming. The *NPRM* also makes certain proposals regarding apparatus requirements for emergency information and video description.

67. Specifically, on the topic of apparatus requirements, the Commission proposes to permit parties to raise technical infeasibility as a defense to a complaint or, alternatively, to file a request for a ruling under § 1.41 of the Commission's rules before manufacturing or importing the product. Similarly, the Commission proposes to permit a manufacturer to raise achievability as a defense to a complaint alleging a violation of section 203, or to seek a determination of achievability from the Commission *before* manufacturing or importing the apparatus. Further, the Commission proposes that a manufacturer may make a request for a Commission determination as to whether its apparatus is an exempt display-only video monitor, and that the Commission will make purpose-based waivers available prospectively and such waivers will be addressed on a case-by-case basis.

68. In the *NPRM,* the Commission also seeks comment on complaint filing for the proposed rules related both to access to emergency information and apparatus requirements for video description and emergency information.

5. Steps Taken To Minimize Significant Impact on Small Entities and Significant Alternatives Considered

69. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.

70. We emphasize at the outset that, although alternatives to minimize economic impact have been and are being considered as part of this proceeding, our proposals are governed by the congressional mandate contained in sections 202(a) and 203 of the CVAA. The *NPRM* seeks comment on whether any alternatives to the proposed use of the secondary audio stream would be preferable, and how the costs and benefits of any alternate proposals would compare to the costs and benefits of the proposed use of the secondary audio stream. Regarding accessible emergency information, the *NPRM* seeks comment on certain specified alternative approaches (for example, including a shortened audio version of the textual emergency information on the primary stream, or broadcasting a 5 to 10 second audio message after three high-pitched tones announcing the start of a textual message), and it additionally seeks comment on any additional alternatives that may become viable in the future (for example, ''dipping'' or lowering the main program audio and playing an aural message over the lowered audio, providing screen reader software or devices on request, enabling users to select and enlarge emergency crawl text, providing guidance for consumers, and using an Internet-based standardized application to filter emergency information by location). Regarding apparatus requirements for emergency information and video description, the *NPRM* proposes that parties may use alternate means of

compliance to the rules adopted pursuant to section 203 of the CVAA, and it proposes to address any specific requests from parties subject to new rules when they are presented to the Commission, rather than specifying what may constitute a permissible ''alternate means.'' Individual entities, including smaller entities, may benefit from this provision.

71. Overall, in proposing rules governing accessible emergency information and apparatus requirements for emergency information and video description, we believe that we have appropriately considered both the interests of individuals who are blind or visually impaired and the interests of the entities who will be subject to the rules, including those that are smaller entities. Our efforts are consistent with Congress' goal of ''updat[ing] the communications laws to help ensure that individuals with disabilities are able to fully utilize communications services and equipment and better access video programming.''

6. Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rule

72. None.

B. Paperwork Reduction Act

73. This document contains proposed new or modified information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (''OMB'') to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995. Public Law 104–13. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, we seek specific comment on how we might ''further reduce the information collection burden for small business concerns with fewer than 25 employees.'' 44 U.S.C. 3506(c)(4).

C. Ex Parte Rules

74. *Permit-But-Disclose.* The proceeding this *NPRM* initiates shall be treated as a ''permit-but-disclose'' proceeding in accordance with the Commission's *ex parte* rules. 47 CFR 1.1200 *et seq.* Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule § 1.1206(b). In proceedings governed by rule § 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.,* .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

D. Filing Requirements

75. *Comments and Replies.* Pursuant to §§ 1.415 and 1.419 of the Commission's rules, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. 47 CFR 1.415, 1.419. Comments may be filed using the Commission's Electronic Comment Filing System (''ECFS''). *See Electronic Filing of Documents in Rulemaking Proceedings,* 63 FR 24121 (1998).

- *Electronic Filers:* Comments may be filed electronically using the Internet by accessing the ECFS: *http://fjallfoss.fcc.gov/ecfs2/.*
- *Paper Filers:* Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th Street SW., Room TW–A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street SW., Washington, DC 20554.

76. *Availability of Documents.* Comments, reply comments, and *ex parte* submissions will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street SW., Room CY–A257, Washington, DC 20554. These documents will also be available via ECFS. Documents will be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat.

77. *People with Disabilities.* To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the FCC's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

78. *Additional Information.* For additional information on this proceeding, contact Diana Sokolow, *Diana.Sokolow@fcc.gov*, or Maria Mullarkey, *Maria.Mullarkey@fcc.gov*, of the Media Bureau, Policy Division, (202) 418–2120.

V. Ordering Clauses

79. Accordingly, *it is ordered* that pursuant to the Twenty-First Century Communications and Video Accessibility Act of 2010, Public Law 111–260, 124 Stat. 2751, and the authority found in sections 4(i), 4(j), 303(u) and (z), 330(b), and 713(g), of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 154(j), 303(u) and (z), 330(b), and 613(g), this *Notice of Proposed Rulemaking Is Adopted.*

80. *It is further ordered* that the Commission's Consumer and Governmental Affairs Bureau, Reference

Information Center, *shall send* a copy of this *Notice of Proposed Rulemaking,* including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 47 CFR Part 79

Cable television operators, Communications equipment, Multichannel video programming distributors (MVPDs), Satellite television service providers, Television broadcasters.

Federal Communications Commission.

Bulah P. Wheeler,

Associate Secretary.

Proposed Rules

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 79 as follows:

PART 79—CLOSED CAPTIONING AND VIDEO DESCRIPTION OF VIDEO PROGRAMMING

1. The authority citation for part 79 will continue to read as follows:

Authority: 47 U.S.C. 151, 152(a), 154(i), 303, 307, 309, 310, 330, 544a, 613, 617.

2. Amend § 79.2 by revising paragraphs (b)(1)(ii), (b)(1)(iii), and (b)(3)(ii) to read as follows:

§ 79.2 Accessibility of programming providing emergency information.

* * * * *

(b) * * *

(1) * * *

(ii) Emergency information that is provided visually during a regularly scheduled newscast, or newscast that interrupts regular programming, must be made accessible to persons with visual disabilities; and

(iii) Emergency information that is provided visually during programming that is not a regularly scheduled newscast, or a newscast that interrupts regular programming, must be accompanied with an aural tone, and beginning [DATES TO BE DETERMINED] must be made accessible to persons with visual disabilities through the use of a secondary audio stream to provide the emergency information aurally.

* * * * *

(3) * * *

(ii) Any video description provided should not block any emergency information.

* * * * *

3. Add § 79.105 to read as follows:

§ 79.105 Video description and emergency information decoder requirements for all apparatus.

(a) Effective [DATES TO BE DETERMINED], all apparatus designed to receive or play back video programming transmitted simultaneously with sound that is part of a broadcast or multichannel video programming distributor service, if such apparatus is manufactured in the United States or imported for use in the United States and uses a picture screen of any size, must have the capability to decode and make available the following services, if technically feasible, unless otherwise provided herein:

(1) The transmission and delivery of video description services as described in § 79.3; and

(2) Emergency information in a manner that is accessible to individuals who are blind or visually impaired as described in § 79.2.

Note to paragraph (a): Apparatus includes the physical device and the video players that manufacturers install into the devices they manufacture before sale, whether in the form of hardware, software, or a combination of both, as well as any video players that manufacturers direct consumers to install after sale.

(b) *Exempt apparatus*—(1) *Display-only monitors.* Apparatus or class of apparatus that are display-only video monitors with no playback capability are not required to comply with the provisions of this section.

(2) *Professional or commercial equipment.* Apparatus or class of apparatus that are professional or commercial equipment not typically used by the public are not required to comply with the provisions of this section.

(3)(i) *Achievable.* Manufacturers of apparatus that use a picture screen of less than 13 inches in size may petition the Commission for a full or partial exemption from the video description and emergency information requirements of this section pursuant to § 1.41 of this chapter, which the Commission may grant upon a finding that the requirements of this section are not achievable, or may assert that such apparatus is fully or partially exempt as a response to a complaint, which the Commission may dismiss upon a finding that the requirements of this section are not achievable.

(ii) The petitioner or respondent must support a petition for exemption or a response to a complaint with sufficient evidence to demonstrate that compliance with the requirements of this section is not ''achievable'' where ''achievable'' means with reasonable effort or expense. The Commission will consider the following factors when determining whether the requirements of this section are not ''achievable:''

(A) The nature and cost of the steps needed to meet the requirements of this section with respect to the specific equipment or service in question;

(B) The technical and economic impact on the operation of the manufacturer or provider and on the operation of the specific equipment or service in question, including on the development and deployment of new communications technologies;

(C) The type of operations of the manufacturer or provider; and

(D) The extent to which the service provider or manufacturer in question offers accessible services or equipment containing varying degrees of functionality and features, and offered at differing price points.

(4) *Waiver.* Manufacturers of apparatus may petition the Commission for a full or partial waiver of the requirements of this section, which the Commission may grant upon a finding that the apparatus meets one of the following provisions:

(i) The apparatus is primarily designed for activities other than receiving or playing back video programming transmitted simultaneously with sound; or

(ii) The apparatus is designed for multiple purposes, capable of receiving or playing back video programming transmitted simultaneously with sound but whose essential utility is derived from other purposes.

4. Add § 79.106 to read as follows:

§ 79.106 Video description and emergency information decoder requirements for recording devices.

(a) Effective [DATES TO BE DETERMINED], all apparatus designed to record video programming transmitted simultaneously with sound that is part of a broadcast or multichannel video programming distributor service, if such apparatus is manufactured in the United States or imported for use in the United States, must comply with the provisions of this section except that apparatus must only do so if it is achievable as defined in § 79.105(b)(3).

Note to paragraph (a): Apparatus includes the physical device and the video players that manufacturers install into the devices they manufacture before sale, whether in the form of hardware, software, or a combination of both, as well as any video players that manufacturers direct consumers to install after sale.

(b) All apparatus subject to this section must enable the rendering or the

pass through of video description signals and emergency information (as that term is defined in § 79.2) such that viewers are able to activate and de-activate the video description as the video programming is played back on a picture screen of any size.

[FR Doc. 2012–28716 Filed 11–27–12; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R8–ES–2012–0075; 4500030114]

Endangered and Threatened Wildlife and Plants; Status Review for a Petition To List the Ashy Storm-Petrel as Endangered or Threatened

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice; initiation of status review and solicitation of new information.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce the opening of an information collection period regarding the status of the ashy storm-petrel (*Oceanodroma homochroa*) throughout its range in the United States. The status review will include analysis of whether the ashy storm-petrel may be an endangered or threatened species due to threats in any significant portion of the range of the ashy storm-petrel. Through this action, we encourage all interested parties to provide us information regarding the status of, and any potential threats to, the ashy storm-petrel throughout its range, or any significant portion of its range.

DATES: To be fully considered for the status review, comments must be submitted on or before December 28, 2012.

ADDRESSES: You may submit comments by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal: *http://www.regulations.gov.* Search for Docket No. FWS–R8–ES–2012–0075, which is the docket number for this rulemaking.

(2) *By hard copy:* Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–R8–ES–2012–0075; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042–PDM; Arlington, VA 22203.

We request that you send comments only by the methods described above. We will post all comments on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (see the Public Comments section below for more information).

FOR FURTHER INFORMATION CONTACT: Mike Chotkowski, Bay-Delta Fish and Wildlife Office, 650 Capitol Mall, Eighth Floor, Sacramento, CA 95814; by telephone at 916–930–5603; or facsimile at 916–930– 5654.

SUPPLEMENTARY INFORMATION:

Public Comments

To ensure that the status review is complete and based on the best available scientific and commercial information, we are soliciting information concerning the status of the ashy storm-petrel. We request any additional information and suggestions from the public, other concerned governmental agencies, Native American Tribes, the scientific community, industry, or any other interested parties. We are opening a 30-day information collection period to allow all interested parties an opportunity to provide information on the status of the ashy storm-petrel throughout its range, including:

(1) Information regarding the species' historical and current population status, distribution, and trends; its biology and ecology; and habitat selection.

(2) Information on the effects of potential threat factors that are the basis for a species' listing determination under section 4(a) of the Endangered Species Act (Act) (16 U.S.C. 1531 *et seq.*), which are:

(a) The present or threatened destruction, modification, or curtailment of the species' habitat or range;

(b) Overutilization for commercial, recreational, scientific, or educational purposes;

(c) Disease or predation;

(d) Inadequacy of existing regulatory mechanisms; and

(e) Other natural or manmade factors affecting its continued existence.

(3) Timing within year, type, and amount of human activities (for example, commercial and recreational fishing, tourism) and their impacts on ashy storm-petrels at locations where ashy storm-petrels are known or suspected to breed, including but not limited to: Van Damme Rock (Mendocino County); Bird, Chimney, and Double Point Rocks (Marin County); the Farallon Islands (San Francisco County); Castle and Hurricane Point Rocks (Monterey County); San Miguel Island, Castle Rock, Prince Island, mainland locations and offshore islets at Vandenberg Air Force Base, Santa Cruz Island, Santa Barbara Island, Sutil Island, and Shag Rock (Santa Barbara County); Anacapa Island (Ventura County); Santa Catalina Island and San Clemente Island (Los Angeles County); and Islas Los Coronados and Islas Todos Santos, Mexico.

(4) Projected changes in sea level along the coast of California during the 21st century, specifically at the locations listed in (3) above and its impact on ashy storm-petrels.

(5) Elevations of known and suitable breeding habitat at the locations listed in (3) above.

(6) Projected acidification of oceanic waters of the California Current during the 21st century and its impact on ashy storm-petrels.

(7) Locations of oil tanker routes, and timing and frequency of oil tanker traffic along the coast of California and Northern Baja California, Mexico, and their impact on ashy storm-petrels.

(8) Nighttime observations of ashy storm-petrels, other storm-petrels, other nocturnal seabirds (for example, Xantus's murrelets (*Synthliboramphus hypoleucus*)), and other seabirds (for example, gulls (*Larus* sp.)) on or near boats (commercial or recreational) off of central and southern California and Baja California, Mexico.

(9) Measured and observed nighttime lighting, and timing within year of nighttime lighting, by boats (commercial and recreational) at locations listed in (3) above, and their impacts on ashy storm-petrels.

(10) Daily and seasonal activity patterns of ashy storm-petrels and avian predators of ashy storm-petrels (for example, western gull (*Larus occidentalis*), burrowing owl (*Athene cunicularia*)) at breeding locations in general and, specifically, in relation to light intensity at night, and their impacts on ashy storm-petrels.

(11) Abundance and distribution of predators of ashy storm-petrels at ashy storm-petrel breeding locations.

(12) Observations of ashy storm-petrels or other storm-petrels at night on offshore oil platforms, or additional evidence that ashy storm-petrels are attracted to or have collided with offshore oil platforms.

(13) Locations of proposed offshore liquefied natural gas (LNG) facilities along the coast of California and Northern Baja California, Mexico, and their impacts on ashy storm-petrels.

(14) Evidence of organochlorine contamination of ashy storm-petrel eggs and birds.

(15) Ingestion of plastics by ashy storm-petrels, distribution and

abundance of plastics in the California Current, and their impact on ashy storm-petrels.

(16) Military activities at sea and on islands off the coast of California and northern Baja California, Mexico, and their impacts on ashy storm-petrels.

(17) Factors that pose a threat to ashy storm-petrels (those listed above, and otherwise) and the potential cumulative effects of these factors and their impacts on ashy storm-petrels.

Please note that comments merely stating support for or opposition to the action under consideration without providing supporting information, although noted, will not be considered in making a determination, because section 4(b)(1)(A) of the Act directs that determinations as to whether any species is a threatened or endangered species must be made ''solely on the basis of the best scientific and commercial data available.'' At the conclusion of the status review, we will issue a new 12-month finding on the petition, as provided in section 4(b)(3)(B) of the Act.

You may submit your information and materials concerning this finding by one of the methods listed in the **ADDRESSES** section.

Before including your address, phone number, email address, or other personal identifying information in your information, you should be aware that we will post your entire comment—including your personal identifying information—on *http://www.regulations.gov.* While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Information and materials we receive, as well as supporting documentation we used in preparing this finding, will be available for public inspection on *http://www.regulations.gov,* or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Bay Delta Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Background

Section 4(b)(3)(A) of the Act requires that we make a finding on whether a petition to list, delist, or reclassify a species presents substantial scientific or commercial information indicating that the petitioned action may be warranted. We are to base this finding on information provided in the petition, supporting information submitted with the petition, and information otherwise available in our files. To the maximum extent practicable, we are to make this finding within 90 days of our receipt of the petition and publish our notice of the finding promptly in the **Federal Register**.

Our standard for substantial scientific or commercial information within the Code of Federal Regulations (CFR) with regard to a 90-day petition finding is ''that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted'' (50 CFR 424.14(b)). If we find that substantial scientific or commercial information was presented, we are required to promptly initiate a species status review, which we subsequently summarize in our 12-month finding. This notice initiates our status review.

On October 16, 2007, we received a petition from the Center for Biological Diversity, requesting that we list the ashy storm-petrel as a threatened or endangered species throughout its range and that we concurrently designate critical habitat. In response to the petition, we sent a letter to the petitioner dated January 11, 2008, stating that we had secured funding and that we anticipated making an initial finding as to whether the petition contained substantial information indicating that listing the ashy storm-petrel may be warranted in Fiscal Year 2008. On May 15, 2008, we published a 90-day petition finding (73 FR 28080) in which we concluded that the petition provided substantial information indicating that listing of the ashy storm-petrel may be warranted, and we initiated a status review. On August 19, 2009, we announced our 12-month finding (74 FR 41832) in which we found that, after reviewing the best available scientific and commercial information, listing the ashy storm-petrel was not warranted. The Center for Biological Diversity challenged this decision in the District Court of the Northern District of California on October 25, 2010 (*Center for Biological Diversity* v. *Salazar,* et al., No. 4:10–CV–4861–DMR (N. D. CA). This challenge was resolved by a September 16, 2011, Stipulation of Dismissal, based on the September 9, 2011, approval of two settlements in *In re Endangered Species Act Section 4 Deadline Litig.,* Misc. Action No. 10–377 (EGS), MDL Docket No. 2165 (D. D.C.), in which the Service agreed to submit a warranted 12-month finding with a concurrent proposed rule to list the ashy storm-petrel or a not-warranted finding regarding the ashy storm-petrel to the **Federal Register** by the end of Fiscal Year 2013.

At this time, we are soliciting new information on the status of and potential threats to the ashy storm-petrel. Information submitted in response to our 2009 12-month finding will be considered and need not be resubmitted. We will base our 12-month finding on a review of the best scientific and commercial information available, including all information received as a result of this notice. For more information on the biology, habitat, and range of the ashy storm-petrel, please refer to our previous 12-month finding published in the **Federal Register** on August 19, 2009 (74 FR 41832).

Author

The primary authors of this document are staff of the U.S. Fish and Wildlife Service, Bay-Delta Field Office.

Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: September 5, 2012.

Rowan W. Gould,

Director, U.S. Fish and Wildlife Service.

[FR Doc. 2012–28811 Filed 11–27–12; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 121115632–2632–01]

RIN 0648–BC70

Control Date To Limit Excessive Accumulation of Control, Qualifying Landings History, and Referendum Eligibility in the Small-Mesh Multispecies Fishery

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Advance notice of proposed rulemaking (ANPR); request for comments.

SUMMARY: At the request of the New England Fishery Management Council, this notice announces a ''control date'' that may be used as a reference for future management actions applicable to, but not limited to, qualifying landings and permit history for a limited access or allocation-based management program and limits on the accumulation of excessive control or ownership of fishing privileges in the small-mesh multispecies fishery. This notice is intended to promote awareness of possible rulemaking; notify the public that any future accumulation of fishing privilege interests in the small-mesh

multispecies fishery may be affected, restricted, or even nullified; and discourage speculative behavior in the market for fishing privileges while the New England Fishery Management Council considers whether and how such limitations on accumulation of fishing privileges should be developed. Interested participants should locate and preserve records that substantiate and verify their control of small-mesh multispecies permits and other fishing privileges, as well as red, silver, and offshore hake, collectively known as small-mesh multispecies, landings history from Federal waters.

DATES: November 28, 2012, shall be known as the ''control date'' for the small-mesh multispecies fishery and may be used as a reference for future management measures related to the maintenance of a fishery with characteristics consistent with the Councils' objectives and applicable Federal laws. Written comments must be received on or before 5 p.m., local time, December 28, 2012.

ADDRESSES: You may submit comments on this document, identified by ''NOAA–NMFS–2012–0212,'' by any of the following methods:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal *www.regulations.gov.* To submit comments via the e-Rulemaking Portal, first click the ''submit a comment'' icon, then enter ''NOAA–NMFS–2012–0212'' in the keyword search. Locate the document you wish to comment on from the resulting list and click on the ''Submit a Comment'' icon on the right of that line.
- *Mail:* Submit written comments to John Bullard, Regional Administrator, National Marine Fisheries Service, 55 Great Republic Drive, Gloucester, MA 01930. Mark the outside of the envelope, ''Comments on SMMS Limited Access and Accumulation Limits Control Date.''
- *Fax:* (978) 281–9135; Attn: Moira Kelly.

Instructions: Comments must be submitted by one of the above methods to ensure that the comments are received, documented, and considered by NMFS. Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered. All comments received are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (e.g., name, address, etc.) submitted voluntarily by the sender will be publicly accessible. Do not submit confidential business information, or otherwise sensitive or protected information. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word or Excel, WordPerfect, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Moira Kelly, Fishery Policy Analyst, phone: 978–281–9218, fax: 978–281–9135.

SUPPLEMENTARY INFORMATION: The small-mesh multispecies fishery is composed of five stocks of three species of hakes (northern silver hake, southern silver hake, northern red hake, southern red hake, and offshore hake), and the fishery is managed primarily through a series of exemptions from the Northeast Multispecies Fishery Management Plan (FMP). The New England Fishery Management Council (Council) manages these fisheries through annual catch limits, in-season and post-season accountability measures, and possession limits.

According to the most recent assessment, none of the small-mesh multispecies stocks are currently overfished or in danger of being overfished, and overfishing is not occurring. The Council sets limits to achieve maximum sustainable yield, which allows for positive impacts to human communities, yet measures (primarily possession limits) are included in the FMP to minimize excessive fishing effort. Despite this and the relatively stable recent catches, the potential remains for a rapid increase in effort and catch due to the open access management status.

Limited access alternatives for the small-mesh multispecies fishery were proposed during 2000 for incorporation in Amendment 12, using a September 9, 1996, control date. The Council proposed entry requirements based on historic participation in the small-mesh multispecies fishery, including factors such as amount of small-mesh multispecies landed and whether or not the vessel had obtained a multispecies permit on or before the previous control date of September 9, 1996. Future participation would have included catch restrictions based on a vessel's past involvement in the fishery. The limited access provisions of Amendment 12 were disapproved by NMFS because they were inconsistent with National Standard 4 regarding fairness and equity of the qualifying criteria, and section 304(e) of the Magnuson-Stevens Fishery Conservation and Management Act, regarding achieving rebuilding objectives. The Council later updated the control date to March 23, 2003, intended for use as part of the basis for determination of potential limited access eligibility with a different set of eligibility criteria. However, development of the limited access program for the small-mesh multispecies fishery stalled due to other priorities of the Council.

The Council is reconsidering limited access in the small-mesh multispecies fishery to address the potential for a rapid increase in fishing effort that could cause overfishing and destabilize markets. Limited access criteria may differ between the northern and southern stock areas due to fishery characteristics and participation. Historically, the northern stock area has seen greater activity involving small-mesh multispecies vessels and trips than the southern stock area. However, access to the directed small-mesh multispecies fishery is more limited in the northern stock area than in the southern stock area. The northern stock area is managed with a series of access areas and seasons, while the vessels may fish with small mesh throughout the southern area year-round. The Council may choose alternatives that account for differences between the areas, focusing on preventing excessive fishing effort. Limited access alternatives may apply to any vessel landing any amount of small-mesh multispecies, or only vessels targeting or landing larger amounts of small-mesh multispecies. The Council intends to develop alternatives that will have thresholds for determining whether a vessel qualifies for limited access or allocation based management program, and, possibly, limits on the accumulation of excessive fishing privileges. The Council may develop alternatives for sector management as well as for limited access. This may include determination of potential section contributions based on a qualifying vessel's history in the fishery. Because the last control date for this fishery is over 10 years old and may not reflect current fishing activities, the Council requested at is September 2012 meeting that NMFS publish this new ANPR ''control date.''

The date of publication of this notification, November 28, 2012, shall be known as the ''control date'' for the small-mesh multispecies fishery and may be used as a reference for future management measures in determining how to treat landings and permit history acquired before or after this date for purposes of establishing a limited access

or allocation-based management program, as well as possibly limiting the accumulation of fishing privileges acquired before or after this date, depending on the Council's determinations on limiting access, control, or ownership of such landings and privileges. The establishment of a control date, however, does not obligate the Council to use this control date or take any action, nor does it prevent the Council from picking another control date or imposing limits on permits acquired prior to the control date. Accordingly, this notification is intended to promote awareness that the Council may develop management measures to address these concerns; to provide notice to the public that any current or future accumulation of fishing privilege interests in the small-mesh multispecies fishery may be affected, restricted, or even nullified; and discourage speculative behavior in the market for fishing privileges while the Council considers whether and how such limitations on accumulation of fishing privileges should be developed. Any measures the Council considers may require changes to the Northeast Multispecies FMP. Such measures may be adopted in a future amendment to the FMP, which would include opportunity for further public participation and comment.

This notification also gives the public notice that interested participants should locate and preserve records that substantiate and verify their control of small-mesh multispecies permits and other fishing privileges in the small-mesh multispecies fishery, as well as small-mesh multispecies landings from Federal waters. Fishing privileges include, but are not limited to vessels, fishing permits, and any other type of catch limit or share.

This notification and control date do not impose any legal obligations, requirements, or expectation.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: November 21, 2012.

Alan D. Risenhoover,

Director, Office of Sustainable Fisheries, performing the functions and duties of the Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

[FR Doc. 2012–28838 Filed 11–27–12; 8:45 am]

BILLING CODE 3510–22–P

Notices

Federal Register
Vol. 77, No. 229
Wednesday, November 28, 2012

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

November 21, 2012.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8958.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Animal and Plant Health Inspection Service

Title: National Animal Health Monitoring System; Layers 2013 Study.

OMB Control Number: 0579–NEW.

Summary of Collection: Collection and dissemination of animal health data and information is mandated by 7 U.S.C. 391, the Animal Industry Act of 1884, which established the precursor of the Animal and Plant Health Inspection Service (APHIS), Veterinary Services (VS), the Bureau of Animal Industry. Legal requirements for examining and reporting on animal disease control methods were further mandated by 7 U.S.C. § 8308 of the Animal Health Protection Act, ''Detection, Control, and Eradication of Diseases and Pests,'' May 13, 2002. The National Animal Health Monitoring System (NAHMS) will initiate the second national data collection of table egg layers through Layers 2013. A *Samonella* Enteritidis working group was formed to identify areas where APHIS: VS should have a role in the prevention and control of *Samonella* Enteritidis on table eggs farms. This working group identified a need to update the information from the NAHMS Layers '99 study as well as a need for a current estimate of the prevalence of *Samonella* Enteritidis on table egg farms.

Need and Use of the Information: APHIS will use the data collected from the Layers 2013 study to: (1) Establish national production measures for producer, veterinary, and industry reference; (2) provide estimates of both outcome (disease or other parameters) and exposure (risks and components) variables that can be used in analytic studies in the future by APHIS; (3) provide input into the design of surveillance systems for specific diseases; (4) provide parameters for animal disease spread models.

Without this type of national data U.S.' ability to detect trends in management, production, and health status that increases/decreases farm economy either directly or indirectly would be reduced or nonexistent.

Description of Respondents: Business or other for-profit.

Number of Respondents: 1,344.

Frequency of Responses: Reporting: Other: One time.

Total Burden Hours: 840.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2012–28833 Filed 11–27–12; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

November 21, 2012.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8958.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it

displays a currently valid OMB control number.

Economic Research Service

Title: Farm to School Census.

OMB Control Number: 0536—NEW.

Summary of Collection: Section 243 of the Healthy, Hunger-Free Kids Act (HHFKA) of 2010 (Pub. L. 111–296) directed USDA to establish a Farm to School program in order to assist eligible entities through grants and technical assistance, in implementing farm to school programs that improve the access to local foods in eligible schools. Under 7 U.S.C. 427, the Secretary of Agriculture is authorized and directed to conduct and to stimulate research into the laws and principles underlying the basic problems of agriculture in its broadest aspects, including but limited to research relating to the improvement of the quality of, and the development of new and improved methods of the production, marketing, distribution, processing, and utilization of plant and animal commodities at all stages from the original producer through the ultimate consumer. The Farm to School Census is a new, one-time, data collection. A questionnaire on purchases of local foods and other farm to school related activities will be sent to public school district School Food Authorities (SFA) in the 50 United States and the District of Columbia.

Need and Use of the Information: USDA's Farm to School Program will use data from the Farm to School Census to develop a baseline assessment of farm to school programs and to set priorities for USDA outreach and technical support, as mandated by the HHFKA. The Farm to School Census will also be used to establish a baseline measure of local food purchases in schools and set priorities for USDA programming related to local school food sourcing. The Farm to School Census data will be used in mapping SFAs that procured local foods for school meal programs in 2011–12 in order to characterize the geographic distribution farm to school programs and obtain State-level estimates of the prevalence of local procurement among SFAs.

Description of Respondents: State, Local or Tribal Government.

Number of Respondents: 13,680.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 1,901.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2012–28834 Filed 11–27–12; 8:45 am]

BILLING CODE 3410–18–P

DEPARTMENT OF COMMERCE

Bureau of the Census

Federal Economic Statistics Advisory Committee Meeting

AGENCY: Bureau of the Census, Department of Commerce.

ACTION: Notice of public meeting.

SUMMARY: The Bureau of the Census (U.S. Census Bureau) is giving notice of a meeting of the Federal Economic Statistics Advisory Committee (FESAC). The Committee will advise the Directors of the Economics and Statistics Administration's (ESA) two statistical agencies, the Bureau of Economic Analysis (BEA) and the Census Bureau, and the Commissioner of the Department of Labor's Bureau of Labor Statistics (BLS) on statistical methodology and other technical matters related to the collection, tabulation, and analysis of federal economic statistics. Last minute changes to the agenda are possible, which could prevent giving advance public notice of schedule adjustments.

DATES: December 14, 2012. The meeting will begin at approximately 9:00 a.m. and adjourn at approximately 4:30 p.m.

ADDRESSES: The meeting will be held at the U.S. Census Bureau Conference Center, 4600 Silver Hill Road, Suitland, MD 20746.

FOR FURTHER INFORMATION CONTACT: Barbara K. Atrostic, Designated Federal Official, Department of Commerce, U.S. Census Bureau, Research and Methodology Directorate, Room 2K267, 4600 Silver Hill Road, Washington, DC 20233, telephone 301–763–6442, email: *Barbara.kathryn.atrostic@census.gov*. For TTY callers, please call the Federal Relay Service (FRS) at 1–800–877–8339 and give them the above listed number you would like to call. This service is free and confidential.

SUPPLEMENTARY INFORMATION: Members of the FESAC are appointed by the Secretary of Commerce. The Committee advises the Directors of the BEA, the Census Bureau, and the Commissioner of the Department of Labor's BLS, on statistical methodology and other technical matters related to the collection, tabulation, and analysis of federal economic statistics. The Committee has been established in accordance with the Federal Advisory Committee Act (Title 5, United States Code, Appendix 2, and Section 10).

The meeting is open to the public, and a brief period is set aside for public comments and questions. Persons with extensive questions or statements must submit them in writing at least three days before the meeting to the Designated Federal Official named above. If you plan to attend the meeting, please register by Monday, December 10, 2012. You may access the online registration form with the following link: *http://www.regonline.com/fesac_dec2012_meeting*. Seating is available to the public on a first-come, first-served basis.

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should also be directed to the Designated Federal Official as soon as known, and preferably two weeks prior to the meeting.

Dated: November 21, 2012.

Thomas L. Mesenbourg, Jr.,

Acting Director, Bureau of the Census.

[FR Doc. 2012–28816 Filed 11–27–12; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–86–2012]

Foreign-Trade Zone 38—Spartanburg County, South Carolina; Notification of Proposed Production Activity; ZF Transmissions Gray Court, LLC, (Automatic Transmissions), Gray Court, SC

The South Carolina State Ports Authority, grantee of FTZ 38, submitted a notification of proposed production activity on behalf of ZF Transmissions Gray Court, LLC (ZFTGC), located in Gray Court, South Carolina. The notification conforming to the requirements of the regulations of the Foreign-Trade Zones Board (15 CFR § 400.22) was received on November 8, 2012.

The ZFTGC facility is located within Site 20 of FTZ 38. The facility is used for the production of automatic transmissions for motor vehicles. Production under FTZ procedures could exempt ZFTGC from customs duty payments on the foreign status components and materials used in export production. On its domestic sales, ZFTGC would be able to choose the duty rate during customs entry procedures that applies to automatic

transmissions (2.5%) for the foreign status inputs noted below. The company would be exempt from customs duty payments on foreign components used in the production of automatic transmissions that would be shipped to auto assembly plants operating under FTZ authority. Customs duties also could possibly be deferred or reduced on foreign status production equipment.

Components and materials sourced from abroad include: control units, pumps, housings, parts of gear boxes and transmissions, valves, accumulators, lock discs, magnetic rings, gears, clutches, o-rings, seal rings, bushings, snap rings, and bearings (duty rate ranges from free to 3.8%).

Public comment is invited from interested parties. Submissions shall be addressed to the Board's Executive Secretary at the address below. The closing period for their receipt is January 7, 2013.

A copy of the notification will be available for public inspection at the Office of the Executive Secretary, Foreign-Trade Zones Board, Room 21013, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230–0002, and in the ''Reading Room'' section of the Board's Web site, which is accessible via *www.trade.gov/ftz.*

For further information, contact Pierre Duy at *Pierre.Duy@trade.gov,* or (202) 482–1378.

Dated: November 23, 2012.

Elizabeth Whiteman,

Acting Executive Secretary.

[FR Doc. 2012–28847 Filed 11–27–12; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–918]

Steel Wire Garment Hangers From the People's Republic of China: 2011–2012 Initiation of Antidumping Duty New Shipper Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

DATES: *Effective Date:* November 28, 2012.

SUMMARY: The Department of Commerce (''the Department'') has determined that a request for a new shipper review (''NSR'') of the antidumping duty order on steel wire garment hangers from the People's Republic of China (''PRC'') meets the statutory and regulatory requirements for initiation.

FOR FURTHER INFORMATION CONTACT: Irene Gorelik, AD/CVD Operations, Office 9, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: 202–482–6905.

SUPPLEMENTARY INFORMATION:

Background

The antidumping duty order on steel wire garment hangers from the PRC (''the Order'') was published on October 6, 2008.[1] On October 22, 2012, pursuant to section 751(a)(2)(B)(i) of the Tariff Act of 1930, as amended (''the Act''), and 19 CFR 351.214, the Department received a timely request to conduct a NSR of the Order from Hangzhou Yingqing Material Co. Ltd. and Hangzhou Qingqing Mechanical Co. Ltd. (together, ''Yingqing'').[2] Yingqing has certified that it is the producer and exporter of the subject merchandise upon which the request was based.[3]

Pursuant to section 751(a)(2)(B)(i)(I) of the Act and 19 CFR 351.214(b)(2)(i), Yingqing certified that it did not export subject merchandise to the United States during the period of investigation (''POI'').[4] In addition, pursuant to section 751(a)(2)(B)(i)(II) of the Act and 19 CFR 351.214(b)(2)(iii)(A), Yingqing certified that, since the initiation of the investigation, it has never been affiliated with any PRC exporter or producer who exported subject merchandise to the United States during the POI, including those respondents not individually examined during the investigation.[5] As required by 19 CFR 351.214(b)(2)(iii)(B), Yingqing also certified that its export activities were not controlled by the PRC central government.[6]

In addition to the certifications described above, pursuant to 19 CFR 351.214(b)(2)(iv), Yingqing submitted documentation establishing the following: (1) The date on which it first shipped subject merchandise for export to the United States; (2) the volume of its first shipment; and (3) the date of its first sale to an unaffiliated customer in the United States.[7]

Initiation of New Shipper Reviews

Pursuant to section 751(a)(2)(B) of the Act and 19 CFR 351.214(d)(1), we find that Yingqing's NSR request meets the threshold requirements for initiation of a NSR for the shipment of steel wire garment hangers from the PRC produced and exported by Yingqing.[8] The period of review (''POR'') is October 1, 2011, through September 30, 2012.[9] The Department intends to issue the preliminary results of this NSR no later than 180 days from the date of initiation, and the final results no later than 270 days from the date of initiation.[10]

It is the Department's usual practice, in cases involving non-market economies (''NMEs''), to require that a company seeking to establish eligibility for an antidumping duty rate separate from the NME entity-wide rate provide evidence of *de jure* and *de facto* absence of government control over the company's export activities. Accordingly, we will issue a questionnaire to Yingqing, which will include a section requesting information with regard to its export activities for separate rate purposes. The NSR will proceed if the response provides sufficient indication that Yingqing is not subject to either *de jure* or *de facto* government control with respect to its exports of subject merchandise.

We will instruct U.S. Customs and Border Protection to allow, at the option of the importer, the posting, until the completion of the NSR, of a bond or security in lieu of a cash deposit for each entry of the subject merchandise from Yingqing in accordance with section 751(a)(2)(B)(iii) of the Act and 19 CFR 351.214(e). Because Yingqing certified that it produced and exported the subject merchandise, the sale of which is the basis for this NSR request, we will apply the bonding privilege to Yingqing only for subject merchandise which Yingqing both produced and exported.

Interested parties requiring access to proprietary information in this NSR should submit applications for disclosure under administrative protective order in accordance with 19 CFR 351.305 and 19 CFR 351.306.

This initiation and notice are published in accordance with section 751(a)(2)(B) of the Act and 19 CFR 351.214 and 351.221(c)(1)(i).

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[1] *See Notice of Antidumping Duty Order: Steel Wire Garment Hangers from the People's Republic of China,* 73 FR 58111 (October 6, 2008).

[2] *See generally* Yingqing's NSR request dated October 22, 2012.

[3] *See id.,* at 1.

[4] *See id.,* at 2 and Ex. 1.

[5] *See id.*

[6] *See id.*

[7] *See id.* at 3 and Ex. 2;Yingqing's Letter to the Department dated November 14, 2012.

[8] *See* ''Memorandum to the File, from Catherine Bertrand, Program Manager, ''Steel Wire Garment Hangers from the People's Republic of China: New Shipper Initiation Checklist,'' dated concurrently with this notice.

[9] *See* 19 CFR 351.214(g)(1)(i)(A).

[10] *See* section 751(a)(2)(B)(iv) of the Act.

Dated: November 20, 2012.

Christian Marsh,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2012–28849 Filed 11–27–12; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; Gulf of Mexico Fishery Management Council Stakeholder Communication Survey

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted on or before January 28, 2013.

ADDRESSES: Direct all written comments to Jennifer Jessup, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616, 14th and Constitution Avenue NW., Washington, DC 20230 (or via the Internet at *JJessup@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Charlene Ponce, (813) 348–1630 ext. 229, or *Charlene.Ponce@gulfcouncil.org.*

SUPPLEMENTARY INFORMATION:

I. Abstract

This request is for a new information collection.

The Gulf of Mexico Fishery Management Council (Council) has adopted a five-year strategic communications plan that requires the Communications staff to not only implement specific outreach and education strategies and tactics to Gulf of Mexico commercial fishermen, recreational anglers, non-governmental organizations, and others interested in fisheries issues, but to also provide a means to evaluate the effectiveness and measure the success of specific tactics. In order to incorporate these performance metrics into the communications plan, a baseline survey is necessary to identify current attitudes, awareness, and communication gaps. This information will help us establish a point from which we can evaluate and measure program effectiveness and success.

The information collected by the survey will be used to achieve a baseline measurement of the effectiveness of current Council communications. The survey will be conducted by council staff through a Web-based survey. A survey link will be emailed to stakeholders, posted on the Council Web site, and published in the Council blog. The link will also be made available through our smart phone regulations Apps and Facebook page. A follow-up survey will be conducted within 2–3 years of the initial survey.

II. Method of Collection

This will be a self-selected, online survey.

III. Data

OMB Control Number: None.

Form Number: None.

Type of Review: Regular submission (request for a new information collection).

Affected Public: Individuals and households; business or other for-profit organizations; not-for-profit institutions.

Estimated Number of Respondents: 900.

Estimated Time per Response: 10 minutes.

Estimated Total Annual Burden Hours: 150.

Estimated Total Annual Cost to Public: $0 in recordkeeping/reporting costs.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: November 21, 2012.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2012–28803 Filed 11–27–12; 8:45 am]

BILLING CODE 3510–22–P

COORDINATING COUNCIL ON JUVENILE JUSTICE AND DELINQUENCY PREVENTION

[OJP (OJJDP) Docket No. 1510]

Meeting of the Coordinating Council on Juvenile Justice and Delinquency Prevention

AGENCY: Coordinating Council on Juvenile Justice and Delinquency Prevention.

ACTION: Notice of meeting.

SUMMARY: The Coordinating Council on Juvenile Justice and Delinquency Prevention (Council) announces its next meeting.

DATES: Wednesday, December 12, 2012, from 10:00 a.m. to 12:00 p.m.

ADDRESSES: The meeting will take place in the third floor main conference room at the U.S. Department of Justice, Office of Justice Programs, 810 7th St. NW., Washington, DC 20531.

FOR FURTHER INFORMATION CONTACT: Visit the Web site for the Coordinating Council at *www.juvenilecouncil.gov* or contact Robin Delany-Shabazz, Designated Federal Official, by telephone at 202–307–9963 [**Note:** This is not a toll-free telephone number], or by email at *Robin.Delany-Shabazz@usdoj.gov* or *Geroma.Void@usdoj.gov.* The meeting is open to the public.

SUPPLEMENTARY INFORMATION: The Coordinating Council on Juvenile Justice and Delinquency Prevention, established pursuant to Section 3(2)A of the Federal Advisory Committee Act (5 U.S.C. App. 2) will meet to carry out its advisory functions under Section 206 of the Juvenile Justice and Delinquency Prevention Act of 2002, 42 U.S.C. 5601, et seq. Documents such as meeting announcements, agendas, minutes, and reports will be available on the Council's Web page, *www.juvenilecouncil.gov,* where you may also obtain information on the meeting.

Although designated agency representatives may attend, the Council membership is composed of the Attorney General (Chair), the Administrator of the Office of Juvenile Justice and Delinquency Prevention (Vice Chair), the Secretary of Health and Human Services (HHS), the Secretary of Labor, the Secretary of Education, the Secretary of Housing and Urban

Development, the Director of the Office of National Drug Control Policy, the Chief Executive Officer of the Corporation for National and Community Service, and the Assistant Secretary of Homeland Security for U.S. Immigration and Customs Enforcement. The nine additional members are appointed by the Speaker of the House of Representatives, the Senate Majority Leader, and the President of the United States. Other federal agencies take part in Council activities including the Departments of Agriculture, Defense, the Interior, and the Substance and Mental Health Services Administration of HHS.

Meeting Agenda

The agenda for this meeting includes: (a) A presentation on the Adverse Childhood Experiences Study by Dr. Vincent Felitti; (b) recommendations from the Attorney General's Task Force on Children Exposed to Violence and discussion; and (c) agency updates and announcements on key initiatives.

Registration

For security purposes, members of the public who wish to attend the meeting must pre-register online at *www.juvenilecouncil.gov* no later than Friday, December 7, 2012. Space is limited and public seating will be first-come, first-seated based on time of arrival on December 12. Two overflow rooms will be available for remote viewing and the meeting will be webcast live. Refer to *www.juvenilecouncil.gov* for details on the webcast. Should problems arise with web registration, call Daryel Dunston at 240–221–4343 or send a request to register to Mr. Dunston. Include name, title, organization or other affiliation, full address and phone, fax and email information and send to his attention either by fax to 301–945–4295, or by email to *ddunston@edjassociates.com.* [**Note:** These are not toll-free telephone numbers.] Additional identification documents may be required.

Note: Photo identification will be required for admission to the meeting.

Written Comments: Interested parties may submit written comments and questions by Friday, December 7, 2012, to Robin Delany-Shabazz, Designated Federal Official for the Coordinating Council on Juvenile Justice and Delinquency Prevention, at *Robin.Delany-Shabazz@usdoj.gov.* The Coordinating Council on Juvenile Justice and Delinquency Prevention expects that the public statements presented will not repeat previously submitted statements. Written questions from the public may be invited at the meeting.

Marilyn Roberts,

Deputy Administrator.

[FR Doc. 2012–28787 Filed 11–27–12; 8:45 am]

BILLING CODE 4410–18–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2012–ICCD–0062]

Agency Information Collection Activities; Comment Request; Student Assistance General Provisions—Financial Assistance for Students With Intellectual Disabilities

AGENCY: Department of Education (ED), Office of Special Education and Rehabilitative Services (OSERS).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 3501 *et seq.*), ED is proposing an extension of an existing information collection.

DATES: Interested persons are invited to submit comments on or before January 28, 2013.

ADDRESSES: Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting Docket ID number ED–2012–ICCD–0062 or via postal mail, commercial delivery, or hand delivery. *Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted.* Written requests for information or comments submitted by postal mail or delivery should be addressed to the Director of the Information Collection Clearance Division, U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Room 2E117, Washington, DC 20202–4537.

FOR FURTHER INFORMATION CONTACT: Electronically mail *ICDocketMgr@ed.gov.* Please do not send comments here.

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Student Assistance General Provisions—Financial Assistance for Students with Intellectual Disabilities.

OMB Control Number: 1845–0099.

Type of Review: Extension of an existing information collection.

Respondents/Affected Public: Private Sector (Not-for-profit institutions).

Total Estimated Number of Annual Responses: 75.

Total Estimated Number of Annual Burden Hours: 26.

Abstract: The U.S. Department of Education is requesting an extension of the approved collection for the regulations allowing students with intellectual disabilities who enrolled in an eligible comprehensive transition and postsecondary program to receive Title IV, Higher Education Act (HEA) program assistance under the Federal Pell Grant, Federal Supplemental Educational Opportunity Grant, and Federal Work Study programs.

Dated: November 21, 2012.

Darrin A. King,

Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management.

[FR Doc. 2012–28780 Filed 11–27–12; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Energy Information Administration

Agency Information Collection Extension

AGENCY: U.S. Energy Information Administration (EIA), Department of Energy.

ACTION: Notice and request for OMB review and comment.

SUMMARY: The EIA has submitted an information collection request to the OMB for extension under the provisions of the Paperwork Reduction Act of 1995. The information collection requests a three-year extension of the Form NWPA–830G, ''Appendix G—Standard Remittance Advice for Payment of Fees,'' including Annex A to Appendix G, OMB Control Number 1901–0260. Form NWPA–830G is an Appendix to the Standard Contract for Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste, entered into by DOE and the generators or owners of spent nuclear fuel. The proposed collection will continue to collect data on quarterly fee payments paid into the Nuclear Waste Fund and on the amount of net electricity generated and sold, upon which the fees are based. There are no proposed changes to the survey forms.

DATES: Comments regarding this proposed information collection must be received on or before December 28, 2012. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, please advise the DOE Desk Officer at OMB of your intention to make a submission as soon as possible. The Desk Officer may be telephoned at 202–395–4718.

ADDRESSES: Written comments should be sent to the:

DOE Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10102, 735 17th Street NW., Washington, DC 20503.

and to:

Department of Energy, U.S. Energy Information Administration, Attn: Marta Gospodarczyk, EI–34, Forrestal Building, 1000 Independence Ave. SW., Washington, DC 20585, 202–586–0527, Fax at 202–586–3045, Email at *marta.gospodarczyk@eia.gov*.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection forms and instructions should be directed to Ms. Gospodarczyk at the contact information given above. Additionally, forms and instructions may be viewed at *http://www.eia.gov/survey/#nwpa-830G.*

SUPPLEMENTARY INFORMATION: This information collection request contains:

(1) *OMB No.* 1901–0260;

(2) *Information Collection Request Title:* Standard Contract for Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste; Appendix G—Standard Remittance Advice for Payment of Fees, including Annex A to Appendix G;

(3) *Type of Request:* Three-year extension of a currently approved data collection;

(4) *Purpose:* Collects basic data from owners and generators of spent nuclear fuel that entered into Standard Contracts with DOE. The forms, which are submitted quarterly, serve as the source documents for entries into DOE accounting records regarding fee payments into the Nuclear Waste Fund.

(5) *Annual Estimated Number of Respondents:* 104;

(6) *Annual Estimated Number of Total Responses:* 416;

(7) *Annual Estimated Number of Burden Hours:* 2080;

(8) *Annual Estimated Reporting and Recordkeeping Cost Burden:* $0; EIA estimates that there are no additional costs to respondents associated with the surveys other than the costs associated with the burden hours.

Statutory Authority: Section 13(b) of the Federal Energy Administration Act of 1974, Pub. L. 93–275, codified at 15 U.S.C. 772(b); Section 302 of the Nuclear Waste Policy Act of 1982, codified at 42 U.S.C. 10222.

Issued in Washington, DC, on November 20, 2012.

Stephanie Brown,

Director, Office of Survey Development and Statistical Integration, U.S. Energy Information Administration.

[FR Doc. 2012–28814 Filed 11–27–12; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. IC13–3–000]

Commission Information Collection Activities; Comment Request; Extension

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice of information collections and request for comments.

SUMMARY: In compliance with the requirements of the Paperwork Reduction Act of 1995, 44 USC 3506(c)(2)(A), the Federal Energy Regulatory Commission (Commission or FERC) is soliciting public comment on the currently approved information collections, FERC–60 (Annual Report of Centralized Service Companies), FERC–61 (Narrative Description of Service Company Functions), and FERC–555A (Preservation of Records Companies and Service Companies Subject to PUHCA [1]).

DATES: Comments on the collections of information are due January 28, 2013.

ADDRESSES: You may submit comments (identified by Docket No. IC13–3–000) by either of the following methods:

- *eFiling at Commission's Web Site: http://www.ferc.gov/docs-filing/efiling.asp.*
- *Mail/Hand Delivery/Courier:* Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE., Washington, DC 20426.

Instructions: All submissions must be formatted and filed in accordance with submission guidelines at: *http://www.ferc.gov/help/submission-guide.asp.* For user assistance contact FERC Online Support by email at *ferconlinesupport@ferc.gov*, or by phone at: (866) 208–3676 (toll-free), or (202) 502–8659 for TTY.

Docket: Users interested in receiving automatic notification of activity in this docket or in viewing/downloading comments and issuances in this docket may do so at *http://www.ferc.gov/docs-filing/docs-filing.asp.*

FOR FURTHER INFORMATION CONTACT: Ellen Brown may be reached by email at *DataClearance@FERC.gov*, telephone at (202) 502–8663, and fax at (202) 273–0873.

SUPPLEMENTARY INFORMATION:

Titles: FERC–60 (Annual Report of Centralized Service Companies), FERC–61 (Narrative Description of Service Company Functions), and FERC–555A (Preservation of Records Companies and Service Companies Subject to PUHCA).

OMB Control No.: 1902–0215.

Type of Request: Three-year extension of the FERC–60, FERC–61, & FERC–555A information collection requirements with no changes to the current reporting requirements.

Abstract: On August 8, 2005, the Energy Policy Act of 2005, was signed into law, repealing the Public Utility Holding Company Act of 1935 (PUHCA 1935) and enacting the Public Utility Holding Company Act of 2005 (PUHCA 2005). Section 1264 [2] and Section 1275 [3] of PUHCA 2005 supplemented FERC's existing ratemaking authority under the Federal Power Act (FPA) to protect customers against improper cross-subsidization or encumbrances of public utility assets, and similarly, FERC's ratemaking authority under the Natural Gas Act (NGA). These provisions of PUHCA 2005 supplemented the FERC's broad authority under FPA Section 301

[1] Public Utility Holding Company Act of 2005.

[2] Federal Books and Records Access Provision.

[3] Non-Power Goods and Services Provision.

and NGA section 8 to obtain the books and records of regulated companies and any person that controls or is under the influence of such companies if relevant to jurisdictional activities.

FERC Form 60

Form No. 60 is an annual reporting requirement under 18 CFR 366.23 for centralized service companies. The report's function is to collect financial information (including balance sheet, assets, liabilities, billing and charges for associated and non-associated companies) from centralized service companies subject to the jurisdiction of the FERC. Unless Commission rule exempts or grants a waiver pursuant to 18 CFR 366.3 and 366.4 to the holding company system, every centralized service company in a holding company system must prepare and file electronically with the FERC the Form No. 60, pursuant to the General Instructions in the form.

FERC–61

FERC–61 is a filing requirement for service companies in holding company systems (including special purpose companies) that are currently exempt or granted a waiver of FERC's regulations and would not have to file FERC Form 60. Instead, those service companies are required to file, on an annual basis, a narrative description of the service company's functions during the prior calendar year (FERC–61). In complying, a holding company may make a single filing on behalf of all of its service company subsidiaries.

FERC–555A

FERC prescribed a mandated preservation of records requirements for holding companies and service companies (unless otherwise exempted by FERC). This requires them to maintain and make available to FERC, their books and records. The preservation of records requirement provides for uniform records retention by holding companies and centralized service companies subject to PUHCA 2005.

Data from the FERC Form 60, FERC–61, and FERC–555A provide a level of transparency that: (1) Helps protect ratepayers from pass-through of improper service company costs, (2) enables FERC to review and determine cost allocations (among holding company members) for certain non-power goods and services, (3) aids FERC in meeting its oversight and market monitoring obligations, and (4) benefits the public, both as ratepayers and investors. In addition, the FERC's audit staff used these records during compliance reviews and special analyses.

If data from the FERC Form 60, FERC–61, and FERC–555A were not available, FERC would not be able to meet its statutory responsibilities, under EPAct 1992, EPAct of 2005, and PUHCA 2005, and FERC would not have all of the regulatory mechanisms necessary to ensure customer protection.

Type of Respondents: Electric transmission facilities.

Estimate of Annual Burden:[4] The Commission estimates the total Public Reporting Burden for this information collection as:

FERC–60 (ANNUAL REPORT OF CENTRALIZED SERVICE COMPANIES), FERC–61 (NARRATIVE DESCRIPTION OF SERVICE COMPANY FUNCTIONS), & FERC–555A (PRESERVATION OF RECORDS COMPANIES AND SERVICE COMPANIES SUBJECT TO PUHCA)

	Number of respondents (A)	Number of responses per respondent (B)	Total number of responses (A) × (B) = (C)	Average burden hours per response (D)	Estimated total annual burden (C) × (D)
FERC–60	34	1	34	75	2,550
FERC–61	82	1	82	0.5	41
FERC–555A	100	1	100	1,080	108,000
Total	.....	.....	.....	.....	110,591

The total estimated annual cost burden to respondents is $4,735,093.16 [$306,000 (FERC Form 60) + $2,829.41 (FERC–61) + $4,426,263.75 (FERC–555A) = $4,735,093.16]

FERC Form 60: 2,550 hours * $120/hour = $306,000.

FERC–61: 41 hours * $69.01/hour = $2,829.41.

FERC–555A:[5]

- Labor costs for paper storage: 108,000 hours * $19/hours[6] = $2,052,000
- Record Retention/storage cost for paper storage (using an estimate of 6,000 ft[3]): $38,763.75.
- Electronic record retention/storage cost: $2,335,500 [108,000 hours ÷ 2 = 54,000 * $28/hour[7] = $1,512,000; electronic record storage cost: 54,000 hours * $15.25/year[8] = $823,500; total electronic record storage: $2,335,500]

Comments: Comments are invited on: (1) Whether the collections of information are necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden and cost of the collections of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information collections; and (4) ways to minimize the burden of the collections of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Dated: November 2, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–28842 Filed 11–27–12; 8:45 am]

BILLING CODE 6717–01–P

[4] The Commission defines burden as the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. For further explanation of what is included in the information collection burden, reference 5 Code of Federal Regulations 1320.3.

[5] Internal analysis assumes 50% electronic and 50% paper storage.

[6] 2012 average hourly wage of filing clerk working within an electric utility.

[7] The Commission bases the $28/hour figure on a FERC staff study that included estimating public utility recordkeeping costs.

[8] Per entity; the Commission bases this figure on the estimated cost to service and to store 1 GB of data (based on the aggregated cost of an IBM advanced data protection server).

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2005–0061; FRL–9363–9]

Azinphos-Methyl; Product Cancellation Order and Amendments To Terminate Uses; Amendment to Existing Stocks Provision

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA issued a notice in the **Federal Register** of February 20, 2008 concerning the cancellation of products containing azinphos-methyl (AZM). EPA corrected typographical errors to the cancellation order in the March 26, 2008 issue of the **Federal Register**. In the cancellation order, all sale, distribution, and use of products containing AZM was prohibited after September 30, 2012. However, due to unusual weather conditions in 2012 that prevented certain crops from developing, many growers were left with unused stocks of AZM. For this reason, on August 29, 2012, EPA amended the existing stocks provisions for only the use of AZM on apples, blueberries, cherries (tart and sweet), parsley, and pears to allow growers to use existing stocks of AZM in their possession for another year, through September 30, 2013. In this notice, EPA is publishing the August 29, 2012 amendment to the existing stocks provision of the cancellation order.

FOR FURTHER INFORMATION CONTACT: Tom Myers, Pesticide Re-evaluation Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: (703) 308–8589; email address: *myers.tom@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

The Agency included in the notice a list of those who may be potentially affected by this action.

B. How can I get copies of this document and other related information?

The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2005–2005–0061, is available at *http://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), EPA West Bldg., Rm. 3334, 1301 Constitution Ave. NW., Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets.*

II. What are the terms of the amended cancellation order?

On August 29, 2012, EPA amended the existing stocks provision of the cancellation order of February 20, 2008, (73 FR 9328), (FRL–8349–8), as corrected on March 26, 2008, (73 FR 16006), (FRL–8355–1) to provide growers with an additional year to use existing stocks of AZM. All the required mitigation measures now reflected on AZM labeling will remain in effect during this use. Distribution or sale of AZM after September 30, 2012, remains prohibited as provided in the February 20, 2008, cancellation order.

The specific terms of the August 29, 2012, existing stocks amendment are as follows:

EPA hereby modifies the cancellation order of February 20, 2008 (73 FR 9328, as amended at 73 FR 16006) to permit use of existing stocks of AZM products until September 30, 2013. Any use of such products must be in accordance with all terms of the previously approved labeling (other than the provisions prohibiting use after September 30, 2012). The distribution and sale provisions of the February 20, 2008 order remain unchanged and, therefore, any distribution or sale of AZM products is prohibited after September 30, 2012, except for purposes of proper disposal, reformulation, or export consistent with FIFRA section 17.

List of Subjects

Environmental protection, Azinphos-methyl, Pesticides and pests.

Dated: November 16, 2012.

Richard P. Keigwin, Jr.,

Director, Pesticide Re-evaluation Division, Office of Pesticide Programs.

[FR Doc. 2012–28725 Filed 11–27–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2010–0014; FRL–9370–3]

Notice of Receipt of Requests to Voluntarily Cancel Certain Pesticide Registrations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In accordance with the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), EPA is issuing a notice of receipt of requests by registrants to voluntarily cancel certain pesticide registrations. EPA intends to grant these requests at the close of the comment period for this announcement unless the Agency receives substantive comments within the comment period that would merit its further review of the requests, or unless the registrants withdraw its requests. If these requests are granted, any sale, distribution, or use of products listed in this notice will be permitted after the registration has been cancelled only if such sale, distribution, or use is consistent with the terms as described in the final order.

DATES: Comments must be received on or before May 28, 2013.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2010–0014, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.
- *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001.

Submit written withdrawal request by mail to: Pesticide Re-evaluation Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001. ATTN: John W. Pates, Jr.

- *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *http://www.epa.gov/dockets/contacts.htm.*

Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at *http://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: John W. Pates, Jr., Pesticide Re-evaluation Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: (703) 308–8195; email address: *pates.john@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action is directed to the public in general, and may be of interest to a wide range of stakeholders including environmental, human health, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides.

B. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

II. What action is the Agency taking?

This notice announces receipt by the Agency of requests from registrants to cancel 22 pesticide products, including certain resmethrin product registrations, registered under FIFRA section 3 or 24(c). These registrations are listed in sequence by registration number (or company number and 24(c) number) in Tables 1a and 1b of this unit.

Unless the Agency determines that there are substantive comments that warrant further review of the requests or the registrants withdraw their requests, EPA intends to issue orders in the **Federal Register** canceling all of the affected registrations.

Resmethrin Products (000432–00667, 000432–00716 and 073049–00086). Resmethrin is a member of the pyrethroid class of pesticides. It is a broad spectrum, non-systemic, synthetic pyrethroid insecticide. There are only three resmethrin products registered at this time, and these products are registered only for public health vector control use, including use as a wide area mosquito abatement insecticide. All other previously registered resmethrin products and uses not listed in this notice have been cancelled in previous **Federal Register** notices. The resmethrin product registrations listed in this **Federal Register** notice (000432–00667, 000432–00716 and 073049–00086) are the last three remaining registrations for resmethrin.

The registrants have requested voluntary cancellation of these resmethrin containing products based on the fact that the costs to fulfill the Data Call-In (DCI) requirements from the 2006 Resmethrin Reregistration Eligibility Decision (RED), the anticipated DCI requirements for the registration review of resmethrin, and the Endocrine Disruptor Screening Program (EDSP) testing order data requirements are not justified by the market opportunity in the vector control business segment. Resmethrin users or anyone else that desires the retention of any of these resmethrin registrations for only public health vector control should contact the applicable registrants during the comment period. For the most up-to-date, complete listing of the registration review and reregistration data needed to support any of these resmethrin registrations, refer to the June 22, 2012 Resmethrin Preliminary Work Plan located in docket number EPA–HQ–OPP–2012–0414 at *www.regulations.gov.* For a complete listing of the Tier I screening battery data required for resmethrin by the Endocrine Disruptor Screening Program, refer to **Federal Register** notice (74 FR 54416, October 21, 2009) located at *www.gpo.gov/fdsys.* These data would need to be submitted well in advance of the proposed cancellation date for EPA to consider amending the cancellation of resmethrin and retaining any of the products listed in this notice.

TABLE 1a—REGISTRATIONS WITH PENDING REQUESTS FOR CANCELLATION

Registration No.	Product name	Chemical name
000264–00977	Tops-MZ-Gaucho Potato Seed-Piece Treatment	Mancozeb, Thiophanate-methyl, Imidacloprid.
000264–00978	Gaucho-MZ Potato Seed-Piece Treatment	Mancozeb, Imidacloprid.
000264–00996	Raxil MD–W Seed Treatment	Metalaxyl, Tebuconazole, Imidacloprid.
005383–00011	Troysan 174	2-((Hydroxymethyl) amino)ethanol.
010466–00028	Ultrafresh DM–50	Tributyltin maleate.
040849–00072	Enforcer P002–082797–RMP	S-Methoprene/Permethrin.
042177–00009	Olympic Algaecide 20	Poly(oxy-1,2-ethanediyl(dimethylimino)-1,2-ethanediyl(dimethylimino)-1,2-ethanediyl dichloride).
046043–00031	Suncoast's Pool Algaecide 20	Poly(oxy-1,2-ethanediyl (dimethylimino)-1,2-ethanediyl (dimethylimino)-1,2-ethanediyl dichloride).
062910–00032	Arch CMIT/MIT	5-Chloro-2-methyl-3(2H)-isothiazolone, 2-Methyl-3(2H)-isothiazolone.
062910–00035	Arch CMIT/MIT 14 MUP	2-Methyl-3(2H)-isothiazolone, 5-Chloro-2-methyl-3(2H)-isothiazolone.
074601–00001	Chlorothalonil Technical Fungicide	Chlorothalonil.
075449–00003	Sodium Bichromate Solution 69%	Dichromic acid, (H2Cr207), disodium salt, dihydrate.
AZ–030006	Dual Magnum Herbicide	S-Metolachlor.
AZ–070007	Gramoxone Inteon	Paraquat dichloride.

TABLE 1a—REGISTRATIONS WITH PENDING REQUESTS FOR CANCELLATION—Continued

Registration No.	Product name	Chemical name
AZ–090001	Ethrel Brand Ethephon Plant Regulator	Ethephon.
CO090004	Actara Insecticide	Thiamethoxam.
CO120001	Gramoxone SL 2.0	Paraquat dichloride.
LA–110006	Milestone VM	Triisopropanolamine salt of aminopyralid.
OR–070032	DuPont Direx 4L Herbicide	Diuron.

TABLE 1b—RESMETHRIN REGISTRATIONS WITH PENDING REQUESTS FOR CANCELLATION

Registration No.	Product name	Chemical name
000432–00667	Scourge Insecticide W/SBP–1382/Piperonyl Butoxide 18% + 54% MF Form. II.	Piperonyl butoxide/Resmethrin.
000432–00716	Scourge Insecticide W/SBP–1382/Piperonyl Butoxide 4% + 12% MF FII.	Piperonyl butoxide/Resmethrin.
073049–00086	SBP–1382 Technical with Antioxidant	Resmethrin.

Table 2 of this unit includes the names and addresses of record for all registrants of the products in Tables 1a and 1b of this unit, in sequence by EPA company number. This number corresponds to the first part of the EPA registration numbers of the products listed in this unit.

TABLE 2—REGISTRANTS REQUESTING VOLUNTARY CANCELLATION

EPA company No.	Company name and address
264	BAYER CROPSCIENCE, LP, 2 T.W. Alexander Drive, P.O. Box 12014, Research Triangle Park, North Carolina 27709.
432	BAYER ENVIRONMENTAL SCIENCE, 2 T.W. Alexander Drive, P.O. Box 12014, Research Triangle Park, North Carolina 27709.
5383	TROY CHEMICAL CORP, 8 Vreeland Road, P.O. Box 955, Florham Park, NJ 07932–4200.
10466	THOMAS RESEARCH ASSOCIATES, Shenstone Estates, 17804 Braemar Pl., Leesburg, Virginia 201767046.
40849	ZEP COMMERCIAL SALES & SERVICES, 4196 Merchant Plaza #344, Lake Ridge, Virginia 22192.
42177	ALLIANCE TRADING, INC, 1150 18th Street NW., Suite 1000, Washington, DC 20036.
46043	SUNCOAST CHEMICALS COMPANY, 14480 62nd St. N, Clearwater, FL 33760.
62190	ARCH WOOD PROTECTION, INC, 5660 New Northside Drive, Suite 1100, Atlanta, Georgia 30328.
73049	VALENT BIOSCIENCES CORPORATION, 870 Technology Way, Libertyville, Illinois 600486316.
74601	OXON ITALIA S.P.A., Agent: Lewis & Harrison, LLC, 122 C Street NW., Suite 740, Washington, DC 20001.
75449	ELEMENTIS CHROMIUM, LP, 5408 Holly Shelter Road, Castle Hayne, NC 28429.
AZ030006 AZ070007 CO090004 CO120001	SYNGENTA CROP PROTECTION, LLC, 410 Swing Road, P.O. Box 18300, Greensboro, NC 27419–8300.
LA110006	DOW AGROSCIENCES, LLC, 9330 Zionsville Rd, 308/2E, Indianapolis, IN 46268–1054.
OR070032	E.I. DUPONT DE NEMOURS and COMPANY (S300/419), Manager, Registration & Regulatory Affairs, 1007 Market Street, Wilmington, Delaware 19898–0001.
AZ090001	BAYER CROPSCIENCE, LP, 2 T.W. Alexander Drive, P.O. Box 12014, Research Triangle Park, NC 27709.

III. What is the Agency's authority for taking this action?

Section 6(f)(1) of FIFRA provides that a registrant of a pesticide product may at any time request that any of its pesticide registrations be canceled. FIFRA further provides that, before acting on the request, EPA must publish a notice of receipt of any such request in the **Federal Register**.

Section 6(f)(1)(B) of FIFRA requires that before acting on a request for voluntary cancellation, EPA must provide a 30-day public comment period on the request for voluntary cancellation or use termination. In addition, FIFRA section 6(f)(1)(C) requires that EPA provide a 180-day comment period on a request for voluntary cancellation or termination of any minor agricultural use before granting the request, unless:

1. The registrants request a waiver of the comment period, or

2. The EPA Administrator determines that continued use of the pesticide would pose an unreasonable adverse effect on the environment.

The registrants in Table 2 of Unit II. have not requested that EPA waive the 180-day comment period. Accordingly, EPA will provide a 180-day comment period on the proposed requests.

IV. Procedures for Withdrawal of Request

Registrants who choose to withdraw a request for cancellation should submit such withdrawal in writing to the person listed under **FOR FURTHER INFORMATION CONTACT**. If the products have been subject to a previous cancellation action, the effective date of cancellation and all other provisions of any earlier cancellation action are controlling.

V. Provisions for Disposition of Existing Stocks

Existing stocks are those stocks of registered pesticide products that are currently in the United States and that were packaged, labeled, and released for shipment prior to the effective date of the cancellation action. If the requests for voluntary cancellation are granted, the EPA intends to publish the

Cancellation Order in the **Federal Register**.

A. For All Products Listed in Table 1a in Unit II

Because the Agency has identified no significant potential risk concerns associated with these pesticide products, upon cancellation of the products identified in Table 1a of Unit II., EPA anticipates allowing registrants to sell and distribute existing stocks of these products for 1 year after publication of the Cancellation Order in the **Federal Register**. Thereafter, registrants will be prohibited from selling or distributing the pesticides identified in Table 1a of Unit II., except for export consistent with FIFRA section 17 or for proper disposal. Persons other than registrants will generally be allowed to sell, distribute, or use existing stocks until such stocks are exhausted, provided that such sale, distribution, or use is consistent with the terms of the previously approved labeling on, or that accompanied, the canceled products.

B. For All Products Listed in Table 1b in Unit II

In any order issued in response to these requests for cancellation of product registrations, EPA proposes to include the following provisions for the treatment of any existing stocks of the products containing resmethrin listed in Table 1b of Unit II.

After December 31, 2015, registrants will be prohibited from selling or distributing existing stocks of products containing resmethrin labeled for all uses.

After December 31, 2015, persons other than the registrants will be allowed to sell, distribute, or use existing stocks of products containing resmethrin until supplies are exhausted, provided that such sale, distribution, or use is consistent with the terms of the previously approved labeling on, or that accompanied, the canceled products.

List of Subjects

Environmental protection, Pesticides and pests.

Dated: November 19, 2012.

Richard P. Keigwin, Jr.,

Director, Pesticide Re-evaluation Division, Office of Pesticide Programs.

[FR Doc. 2012–28726 Filed 11–27–12; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL DEPOSIT INSURANCE CORPORATION

FDIC Advisory Committee on Economic Inclusion (ComE-IN); Notice of Meeting

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Notice of Open Meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, notice is hereby given of a meeting of the FDIC Advisory Committee on Economic Inclusion, which will be held in Washington, DC. The Advisory Committee will provide advice and recommendations on initiatives to expand access to banking services by underserved populations.

DATES: Thursday, December 13, 2012, from 1:30 p.m. to 5:30 p.m.

ADDRESSES: The meeting will be held in the FDIC Board Room on the sixth floor of the FDIC Building located at 550 17th Street NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Requests for further information concerning the meeting may be directed to Mr. Robert E. Feldman, Committee Management Officer of the FDIC, at (202) 898–7043.

SUPPLEMENTARY INFORMATION:

Agenda: The agenda will be focused on the results of the FDIC's Survey of Banks' Efforts to Serve the Unbanked and Underbanked, current household savings trends and initiatives, and an update on mobile financial services. The agenda may be subject to change. Any changes to the agenda will be announced at the beginning of the meeting.

Type of Meeting: The meeting will be open to the public, limited only by the space available on a first-come, first-served basis. For security reasons, members of the public will be subject to security screening procedures and must present a valid photo identification to enter the building. The FDIC will provide attendees with auxiliary aids (e.g., sign language interpretation) required for this meeting. Those attendees needing such assistance should call (703) 562–6067 (Voice or TTY) at least two days before the meeting to make necessary arrangements. Written statements may be filed with the committee before or after the meeting. This ComE-IN meeting will be Webcast live via the Internet at: *http://www.vodium.com/goto/fdic/advisorycommittee.asp.* This service is free and available to anyone with the following systems requirements: *http://www.vodium.com/home/sysreq.html.* Adobe Flash Player is required to view these presentations. The latest version of Adobe Flash Player can be downloaded at *http://www.adobe.com/shockwave/download/download.cgi?P1_Prod_Version=ShockwaveFlash.* Installation questions or troubleshooting help can be found at the same link. For optimal viewing, a high speed Internet connection is recommended. The ComE-IN meeting videos are made available on-demand approximately two weeks after the event.

Dated: November 23, 2012.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary, Federal Deposit Insurance Corporation.

[FR Doc. 2012–28804 Filed 11–27–12; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL MARITIME COMMISSION

Notice of Agreements Filed

The Commission hereby gives notice of the filing of the following agreements under the Shipping Act of 1984. Interested parties may submit comments on the agreements to the Secretary, Federal Maritime Commission, Washington, DC 20573, within ten days of the date this notice appears in the **Federal Register**. Copies of the agreements are available through the Commission's Web site (*www.fmc.gov*) or by contacting the Office of Agreements at (202)–523–5793 or *tradeanalysis@fmc.gov*.

Agreement No.: 011314–001 (2nd Edition).

Title: CSAV/SSI Cooperative Working Agreement.

Parties: Compania Sud Americana de Vapores S.A. and Swordfish Shipping Inc.

Filing Party: Walter H. Lion Esq.; McLaughlin & Stern, LLP; 260 Madison Avenue, New York, New York 10016.

Synopsis: The amendment removes rate discussion authority, authorizes the parties to charter space to each other on a ad hoc, case by case basis, updates both parties address, and various other changes.

Agreement No.: 012187–000.

Title: Siem Car Carrier Pacific AS/ Hoegh Autoliners, Inc. Space Charter Agreement.

Parties: Siem Car Carrier Pacific AS and Hoegh Autoliners, Inc.

Filing Party: Ashley W. Craig Esq.; Venable LLP; 575 Seventh Street NW., Washington, DC 20004.

Synopsis: The agreement authorizes the parties to charter space to each other

in the trade between China, Japan and Korea, on the one hand, and the U.S. West Coast on the other hand.

Agreement No.: 012188–000.

Title: Matson/Kyowa Space Charter Agreement.

Parties: Matson Navigation Company, Inc. (''Matson'') and Kyowa Shipping Co., Ltd. (''Kyowa'').

Filing Party: Sloan White; Matson; 555 12th Street, Oakland, California 94607.

Synopsis: The agreement authorizes the parties to charter space to each other in the trade between ports in Japan and Korea, on the one hand, and ports in Guam and the Commonwealth of the Northern Mariana Islands, on the other hand.

Agreement No.: 012189–000.

Title: Matson/Kyowa Space Charter Agreement for Guam and Pacific Islands.

Parties: Matson Navigation Company, Inc. (''Matson'') and Kyowa Shipping Co., Ltd. (''Kyowa'').

Filing Party: Sloan White; Matson; 555 12th Street, Oakland, California 94607.

Synopsis: The agreement authorizes the parties to charter space to each other in the trade between ports of Guam, on the one hand and ports in the Commonwealth of the Northern Mariana Islands, the Republic of the Marshall Islands, the Federated States of Micronesia and the Republic of Palau, on the other hand.

By Order of the Federal Maritime Commission.

Dated: November 21, 2012.

Karen V. Gregory,

Secretary.

[FR Doc. 2012–28779 Filed 11–27–12; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License Applicants

The Commission gives notice that the following applicants have filed an application for an Ocean Transportation Intermediary (OTI) license as a Non-Vessel-Operating Common Carrier (NVO) and/or Ocean Freight Forwarder (OFF) pursuant to section 19 of the Shipping Act of 1984 (46 U.S.C. 40101). Notice is also given of the filing of applications to amend an existing OTI license or the Qualifying Individual (QI) for a licensee.

Interested persons may contact the Office of Ocean Transportation Intermediaries, Federal Maritime Commission, Washington, DC 20573, by telephone at (202) 523–5843 or by email at *OTI@fmc.gov.*

5G Logistics Solutions LLC (NVO & OFF), 5090 NW 116th Court, Doral, FL 33178. Officers: Carolina Loyola, President (QI), Claudia M. Rojas, Vice President. Application Type: New NVO & OFF License.

American Cargo International, Inc. (NVO & OFF), 1303 NW 78th Avenue, Miami, FL 33128. Officers: Annia De Paz, Vice President (QI), Alina Quintana, Member. Application Type: License Transfer to American Cargo International, LLC.

Atlanta Customs Brokers & Intl Freight Forwarders Inc dba ACB Ocean Services (NVO & OFF), 650 Atlanta South Parkway, Suite 104, Atlanta, GA 30349. Officers: Kathy Williams, Vice President Exports (QI), Harold Hagans, President. Application Type: New NVO & OFF License.

Bennett International Transport, L.L.C. (NVO & OFF), 1001 Industrial Parkway, McDonough, GA 30253. Officers: Tricia B. Reynolds, Vice President (QI), Marcia G. Taylor, Managing Member. Application Type: QI Change.

CMS Shipping Agency, Inc. dba Atlantic Pacific Lines (NVO & OFF), 1074 Broadway, Suite 200, West Long Branch, NJ 07764. Officer: Munish Sachdev, President (QI). Application Type: Name Change to Atlantic Pacific Lines, Inc, dba Atlantic Pacific Lines.

DBN Carrier, Inc. (NVO), 430 S. Burnside Avenue, Suite 5B, Los Angeles, CA 90036. Officers: Bayasgalan Lkhamsuren, President (QI), Amgalan Lkhamsuren, Secretary. Application Type: New NVO License.

Evgeny Lavrentev dba Galaxy Enterprises LA (NVO), 15445 Ventura Blvd., Suite 25, Sherman Oaks, CA 91403. Officer: Evgeny Lavrentev, Sole Proprietor (QI). Application Type: New NVO License.

Forward Systems Group, Inc. (NVO & OFF), 1915 NW 79th Avenue, Doral, FL 33126. Officers: Maurice Forelle, President (QI), Cesar R. Castano, COO. Application Type: New NVO & OFF License.

James J. Boyle & Co. dba JJB Global Logistics Co., Ltd. dba JJB Inland Logistics JJB Link Logistics Company Limited (NVO & OFF), 1097 Sneath Lane, San Bruno, CA 94066. Officers: Greg Kodama, President (QI), Edward H. Inouye, CEO. Application Type: Delete Trade Names JJB Global Logistics Co., Ltd. and JJB Inland Logistics.

Marcos Enterprises, Inc. dba Comprayenvia.Net (NVO & OFF), 6923 Narcoossee Road, Suite 623, Orlando, FL 32822. Officers: Marcos Urbina, President (QI), Rosana Lopez, Secretary. Application Type: New NVO & OFF License.

NMC Logistics Solutions, Inc. (NVO & OFF), 9910 NW 21st Street, Doral, FL 33172. Officers: Orlando Jimenez, President (QI), Natty Moreno, Secretary. Application Type: New NVO & OFF License.

Platinum Cargo Logistics, Inc. (NVO & OFF), 19250 S. Van Ness Avenue, Torrance, CA 90501. Officers: Andrew R. Mancione, Midwest Regional Vice President (QI), Kelli Spiri, President. Application Type: QI Change.

Pole Star Shipping Inc (NVO & OFF), 65 Demarest Drive, Manalapan, NJ 07726. Officers: Angela Simeone, Secretary (QI), Ashwani Sharma, President. Application Type: New NVO & OFF License.

Project Rail, LLC dba Vectora Transportation (NVO & OFF), 200 West Madison, Suite 1820, Chicago, IL 60606. Officers: Christopher M. Ball, President (QI), Graham Y. Brisben, Manager/Member. Application Type: Transfer to Vectora Solutions, LLC dba Vectora Transportation.

Rahm Logistics, Inc. (OFF), 3750 Fairfax Way, South San Francisco, CA 94090. Officer: Herbert W. Rahm, CEO (QI). Application Type: New OFF License.

Sprint Cargo Corp. (NVO), 3636 33rd Street, Suite 207, Astoria, NY 11106. Officer: Ali A. Siddiqui, President (QI). Application Type: New NVO License.

SR Intel Freight, Inc. (NVO), 625 West Victoria Street, Compton, CA 90220. Officer: Wu J. Yi, President (QI). Application Type: Name Change to SR Inter Freight, Inc.

Transphere, Inc. dba Transend International (NVO & OFF), 5800 Commerce Drive, Suite 101, Westland, MI 48185. Officers: Chetan Koradia, President (QI), Smita Koradia, Vice President. Application Type: Add NVO Service.

By the Commission.

Dated: November 23, 2012.

Karen V. Gregory,

Secretary.

[FR Doc. 2012–28836 Filed 11–27–12; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License Revocations

The Commission gives notice that the following Ocean Transportation Intermediary licenses have been

revoked pursuant to section 19 of the Shipping Act of 1984 (46 U.S.C. 40101) effective on the date shown.

License No.: 011525N.

Name: Equipsa N.V.O.C.C. Inc.

Address: 2105 NW 102nd Avenue, Miami, FL 33172.

Date Revoked: October 5, 2012.

Reason: Voluntary Surrender of License.

License No.: 018156N.

Name: Cargo Alliance Inc.

Address: 583 Monterey Pass Road, Suite C, Monterey Park, CA 91754.

Date Revoked: October 31, 2012.

Reason: Voluntary Surrender of License.

Vern W. Hill,

Director, Bureau of Certification and Licensing.

[FR Doc. 2012–28775 Filed 11–27–12; 8:45 am]

BILLING CODE 6730–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Meeting of the President's Council on Fitness, Sports, and Nutrition

AGENCY: President's Council on Fitness, Sports, and Nutrition, Office of the Assistant Secretary for Health, Office of the Secretary, Department of Health and Human Services.

ACTION: Notice of meeting.

SUMMARY: As stipulated by the Federal Advisory Committee Act, the U.S. Department of Health and Human Services (DHHS) is hereby giving notice that the President's Council on Fitness, Sports, and Nutrition (PCFSN) will hold a meeting (Webinar format only). The meeting will be open to the public. Registration is required.

DATES: December 13, 2012 at 3:00 p.m.–4:00 p.m. EST.

ADDRESSES: Register for the Webinar meeting at: *www.health.gov/PAguidelines.*

FOR FURTHER INFORMATION CONTACT: Megan Nechanicky, MS, RD, Oak Ridge Institute for Science and Education Fellow, President's Council on Fitness, Sports, and Nutrition, Department of Health and Human Services, 1101 Wootton Parkway, Suite 560, Rockville, MD 20852. Phone: (240) 276–9869.

SUPPLEMENTARY INFORMATION: The PCFSN was established under Executive Order 13265, dated June 6, 2002, as amended by Executive Order 13545, dated June 22, 2010. The Council works to expand interest in and awareness of regular physical activity, fitness, sports participation, and good nutrition for Americans of all ages by encouraging the development, improvement, or enhanced coordination of programs that address physical activity and good nutrition. In performing its functions, the Council will take into account the Federal Dietary Guidelines for Americans and the Physical Activity Guidelines for Americans. The Council is required to meet, at a minimum, one time per fiscal year.

The Council will meet on December 13, 2012, to receive the draft Physical Activity Guidelines for Americans Mid-course Report for deliberation and approval. The Physical Activity Guidelines Mid-course Report will complement the *2008 Physical Activity Guidelines for Americans;* The Mid-course Report is expected to be released in 2013.

The December 13, 2012, meeting is open to the public via a webinar format. Every effort will be made to provide reasonable accommodations for persons with disabilities and/or special needs who wish to attend the meeting. Persons with disabilities and/or special needs should call (240) 276–9869 no later than close of business on December 7, 2012, to request accommodations.

Dated: November 7, 2012.

Shellie Y. Pfohl,

Executive Director, President's Council on Fitness, Sports and Nutrition.

[FR Doc. 2012–28781 Filed 11–27–12; 8:45 am]

BILLING CODE 4150–35–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Notice of Public Meeting

AGENCY: Office of Global Affairs, OS, HHS.

ACTION: Public Meeting/Teleconference/Listening Session.

SUMMARY: The session will allow members of the public the opportunity to provide individual feedback on the recommendations included in the Report of the WHO's Consultative Expert Working Group on R&D Financing and Coordination (CEWG).

DATES: Meeting will be held on December 18, 2012 at 4 p.m. EST.

ADDRESSES: Meeting will be held at the Institute of Medicine of the National Academies and via teleconference: The Keck Center, 500 Fifth Street NW., Washington, DC, Phone: 202–334–2000. To RSVP for the event, please visit the following web address: *www.iom.edu/globalhealthresearch.*

FOR FURTHER INFORMATION CONTACT: For more information, please contact Hannah Burris, Office of Global Affairs, U.S. Department of Health and Human Services. Email: *hannah.burris@hhs.gov.* Telephone (202) 260–1812.

SUPPLEMENTARY INFORMATION:

Status: The meeting will be open to the public.

Purpose: WHO Member States requested the establishment of the Consultative Expert Working Group on Research and Development: Financing and Coordination (CEWG) to find innovative solutions to address the unmet need for research and development for diseases affecting developing countries. The CEWG was established by the World Health Assembly in 2010 by resolution WHA63.28. In April of 2012, the CEWG issued their Report, which included a series of recommendations. At the World Health Assembly in May 2012, Member States passed Resolution 65.22 urging all countries to hold national-level consultations to consider the Report and its recommendations.

The Office of Global Affairs within HHS is the lead USG coordinating agency on the World Health Organization and its related work, including consideration of the recommendations put forward by the CEWG. This public meeting, co-hosted by HHS Office of Global Affairs and the Institute of Medicine, is intended to provide an opportunity for input on the CEWG recommendations more broadly. This public meeting will serve as the national-level consultation and is primarily a listening session, where individuals representing a personal viewpoint or that of their organization can provide input.

Agenda: The meeting/teleconference will be held on December 18th, 2012. The session will start with a short introduction on the recommendations and history of the CEWG. Members of the public will then be able to provide individual input on the recommendations of the CEWG.

Dated: November 16, 2012.

Jimmy Kolker,

Deputy Director, Office of Global Affairs.

[FR Doc. 2012–28782 Filed 11–27–12; 8:45 am]

BILLING CODE 4150–38–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary, Office of the Assistant Secretary for Administration

Statement of Organization, Functions, and Delegations of Authority

Part A, Office of the Secretary, Statement of Organization, Functions, and Delegations of Authority for the Department of Health and Human Services (HHS) is being amended at Chapter AJ, Office of the Assistant Secretary for Administration, which was last amended at 75 FR 369–370, dated January 5, 2010, and most recently at 77 FR 2729, dated January 19, 2012. Part P, Program Support Center (PSC), Statement of Organization, Functions, and Delegations of Authority for the Department of Health and Human Services (HHS), which was last amended at 75 FR 369–370, dated January 5, 2010, is not being amended, because the functions transferred to PSC in this notice are already covered by the general description of PSC's functions at 75 FR 369–370. This notice transfers the functions of the Office for Facilities Management and Policy (OFMP) in Part A, Chapter AJ to the PSC in Part P and establishes a new major component, within PSC, that combines OFMP's functions with building operations and logistics/warehouse activities currently being performed by components within the PSC. The mission of this new component will be to set building management policy efficiently and effectively. It will also offer building and logistics operations on a fee-for-service basis to the Department and other federal customers. On an incumbent-only basis, the Deputy Assistant Secretary (DAS) for OFMP will continue to directly report to the Assistant Secretary for Administration (ASA). This notice also transfers the budget and financial resources and Department-wide multi-sector workforce management activities previously performed by the Office of Business Management and Transformation to the Program Support Center. Finally, this notice also updates information regarding the Office for Security and Strategic Information's (OSSI's) organizational structure, as well as the new roles and responsibilities for the Deputy Assistant Secretary for Security/Secretary's Senior Intelligence Official and for OSSI. The technical changes are as follows:

A. Under Chapter AJ, Section AJ.10, Organization, delete ''Office for Facilities Management and Policy (AJE).''

B. Under Chapter AJ, Section AJ.20, Functions, delete the second paragraph, which begins with, ''Office for Facilities Management and Policy (AJE),'' in its entirety.

C. Under Chapter AJ, Section AJ.20, Functions, second to last paragraph, which begins with, ''Office of Business Management and Transformation (AJJ),'' delete the second and third sentences, which start with, ''OBMT manages the budget * * *'' and ''OBMT oversees Department-wide multi-sector * * *, '' respectively.

D. Under Chapter AJ, Section AJ.20, Functions, delete the last paragraph, which begins with, ''Office of Security and Strategic Information (AJS),'' in its entirety and replace with the following:

Office of Security and Strategic Information (AJS)

The Office of the Secretary (OS) established the Deputy Assistant Secretary (DAS) for Security in the Division of Administration. DAS Security directly reports to the Assistant Secretary for Administration on security issues and also serves as the Secretary's Senior Intelligence Official as a direct report to the Deputy Secretary on intelligence and counterintelligence issues. DAS Security has been delegated original classification authority by the Secretary. DAS Security manages the Office of Security and Strategic Information (OSSI). OSSI's vision is for HHS personnel to successfully accomplish missions worldwide in a security-informed manner and with the actionable intelligence needed, at the right time, for operational and policy decisions. OSSI's responsibilities include: Integrating intelligence and security information into HHS policy and operational decisions; assessing, anticipating, and warning of potential security threats to the Department and our national security; and, providing policy guidance on and managing the OS implementation of the Department's security, intelligence and counterintelligence programs. OSSI's programs include physical security, critical infrastructure protection for HHS facilities, personnel suitability and security, security access management and the continued implementation of Homeland Security Policy Directive 12, classified national security information management, secure compartmented information facilities management, communications security, safeguarding and sharing of classified information, cyber threat intelligence, and counterintelligence. In coordination with the Director of National Intelligence, OSSI has been designated as a Federal Intelligence Coordinating Office and the DAS Security serves as the HHS Federal Senior Intelligence Coordinator. OSSI has responsibilities to establish implementing guidance, provide oversight, and manage the Department's policy for the sharing, safeguarding, and coordinated exchange of information related to national or homeland security with other federal departments and agencies, including law enforcement organizations and the Intelligence Community, in compliance with HHS policies and applicable laws, regulations, and Executive Orders.

E. *Delegation of Authority.* Pending further redelegation, directives or orders made by the Secretary, Deputy Secretary, or ASA, all delegations and redelegations of authority made to officials and employees of affected organizational components will continue in them or their successors pending further redelegations, provided they are consistent with this reorganization.

Dated: November 16, 2012.

E.J. Holland, Jr.,

Assistant Secretary for Administration.

[FR Doc. 2012–28783 Filed 11–27–12; 8:45 am]

BILLING CODE 4151–17–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Patents and Inventions; Delegation of Authority

Notice is hereby given that I have delegated to the Deputy Associate Director for Science, Office of the Associate Director for Science, CDC, without authority to redelegate, all authorities to administer and make decisions regarding the invention and patent program of CDC and the authority to make determinations of rights in inventions and patents in which CDC and the Department have an interest.

This delegation excludes the authority under 35 U.S.C. 203 (March-in Rights) and the authority to submit reports to Congress.

In addition, this delegation excludes those authorities under the Stevenson-Wydler Technology Act of 1980, as amended by the Federal Technology Transfer Act of 1986 and the National Technology Transfer and Advancement Act of 1995, which are governed by a separate delegation.

The exercise of this authority must be in accordance with applicable laws, regulations, and Office of Government Ethics, U.S. Office of Personnel

Management, and DHHS policies and instructions.

This delegation became effective upon date of signature. I hereby affirm and ratify any actions taken that involve the exercise of the authorities delegated herein prior to the effective date of this delegation.

Dated: November 14, 2012.

Thomas R. Frieden,

Director, Centers for Disease Control and Prevention.

[FR Doc. 2012–28733 Filed 11–27–12; 8:45 am]

BILLING CODE 4160–18–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Comment Request

Proposed Projects

Title: Child Support Enforcement Program Expenditure Report (Form OCSE–396A) and the Child Support Enforcement Program Collection Report (Form OCSE–34A).

OMB No.: 0970–0181.

Description: State and Tribal agencies administering the Child Support Enforcement Program under Title IV–D of the Social Security Act are required to provide information each fiscal quarter to the Office of Child Support Enforcement (OCSE) concerning administrative expenditures and the receipt and disposition of child support payments from non-custodial parents. State title IV–D agencies report quarterly expenditures and collections using Forms OCSE–396A and OCSE–34A, respectively. Tribal title IV–D agencies report quarterly expenditures using Form SF–269, as prescribed in program regulations, and formerly reported quarterly collections using only a modified version of Form OCSE–34A. The information collected on these reporting forms is used to compute quarterly grant awards to States and Tribes, the annual incentive payments to States and provides valuable information on program finances. This information is also included in a published annual statistical and financial report, available to the general public.

In response to an earlier **Federal Register** Notice (75 FR 10805, March 9, 2010), this agency received insufficient comments to support any substantial changes to these forms at this time. However, we continue to discuss improvements to these reporting forms with State and Tribal grantees and anticipate some minor revisions will be proposed in the near future. These revisions will be limited to any changes that may be necessitated by the expiration of program requirements under the ''American Recovery and Reinvestment Act of 2009'' (ARRA) and changes to reporting instructions that will allow Tribal grantees to, at least, use the same quarterly collection report submitted by State grantees.

Respondents: State agencies (including the District of Columbia, Puerto Rico, Guam and the Virgin Islands) administering the Child Support Enforcement Program.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
OCSE–396A	54	4	6	1,296
OCSE–34A	54	4	14	3,024

Estimated Total Annual Burden Hours: 4,320.

In compliance with the requirements of Section 506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Administration for Children and Families is soliciting public comment on the specific aspects of the information collection described above. Copies of the proposed collection of information can be obtained and comments may be forwarded by writing to the Administration for Children and Families, Office of Planning, Research and Evaluation, 370 L'Enfant Promenade SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. Email address: *infocollection@acf.hhs.gov.* All requests should be identified by the title of the information collection.

The Department specifically requests comments on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Robert Sargis,

Reports Clearance Officer.

[FR Doc. 2012–28795 Filed 11–27–12; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2012–N–0386]

Agency Information Collection Activities; Announcement of Office of Management and Budget Approval; Registration and Product Listing for Owners and Operators of Domestic Tobacco Product Establishments and Listing of Ingredients in Tobacco Products

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a collection of information entitled ''Registration and Product Listing for Owners and Operators of Domestic Tobacco Product Establishments and Listing of Ingredients in Tobacco Products'' has been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995.

FOR FURTHER INFORMATION CONTACT: Daniel Gittleson, Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20850, 301–796–5156, *Daniel.Gittleson@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: On August 9, 2012, the Agency submitted a proposed collection of information entitled ''Registration and Product Listing for Owners and Operators of Domestic Tobacco Product Establishments and Listing of Ingredients in Tobacco Products'' to OMB for review and clearance under 44 U.S.C. 3507. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. OMB has now approved the information collection and has assigned OMB control number 0910–0650. The approval expires on October 31, 2015. A copy of the supporting statement for this information collection is available on the Internet at *http://www.reginfo.gov/public/do/PRAMain.*

Dated: November 21, 2012.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2012–28774 Filed 11–27–12; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2012–N–1134

Sodium Nitrite Injection and Sodium Thiosulfate Injection Drug Products Labeled for the Treatment of Cyanide Poisoning; Enforcement Action Dates

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing its intention to take enforcement action against unapproved injectable drug products containing sodium nitrite labeled for the treatment of cyanide poisoning and unapproved injectable drug products containing sodium thiosulfate labeled for the treatment of cyanide poisoning, and persons who manufacture or cause the manufacture or distribution of such products in interstate commerce. Cyanide antidotes carry serious risks and some unapproved drug products may lack Boxed Warnings and other warnings required in the labeling of approved cyanide antidotes. These unapproved drug products compete with approved products, and thus pose a direct challenge to the drug approval system. Injectable drug products containing sodium nitrite or sodium thiosulfate that are labeled for the treatment of cyanide poisoning are new drugs that require approved new drug applications (NDAs) or abbreviated new drug applications (ANDAs) in order to be legally marketed.

DATES: This notice is effective November 28, 2012. For information about enforcement dates, see **SUPPLEMENTARY INFORMATION**, section IV.

ADDRESSES: All communications in response to this notice should be identified with Docket No. FDA–2012–N–1134 and directed to the appropriate office listed in this document.

Applications under section 505(b) of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 355(b)): Division of Anesthesia, Analgesia, and Addiction Products, Office of New Drugs, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 22, Silver Spring, MD 20993–0002.

Applications under section 505(j) of the FD&C Act (21 U.S.C. 355(j)): Office of Generic Drugs, Center for Drug Evaluation and Research, Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855.

All other communications: Lori Cantin, Office of Unapproved Drugs and Labeling Compliance, Division of Prescription Drugs, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 5239, Silver Spring, MD 20993–0002.

FOR FURTHER INFORMATION CONTACT: Lori Cantin, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 5239, Silver Spring, MD 20993–0002, 301–796–1212, email: *lori.cantin@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Cyanide is highly toxic in humans and can be fatal if not immediately treated with an effective antidote. On January 14, 2011, FDA approved NDA 201444 for Nithiodote, a co-packaged Sodium Nitrite Injection and Sodium Thiosulfate Injection drug product, labeled for treatment of acute cyanide poisoning that is judged to be life-threatening. On February 14, 2012, FDA approved NDA 203922 for Sodium Nitrite Injection for sequential use with sodium thiosulfate for treatment of acute cyanide poisoning that is judged to be life-threatening, and NDA 203923 for Sodium Thiosulfate Injection for sequential use with sodium nitrite for treatment of acute cyanide poisoning that is judged to be life-threatening. Sodium thiosulfate and sodium nitrite pose the risk of hypotension (low blood pressure), and sodium nitrite also poses the risk of methemoglobinemia, a disorder characterized by the presence of a higher than normal level of methemoglobin in the blood. Methemoglobin is an oxidized form of hemoglobin that has a decreased affinity for oxygen, resulting in a reduced ability to release oxygen to body tissue. Methemoglobinemia can lead to neurological and cardiac symptoms due to lack of adequate oxygen in body tissues. The approved Sodium Nitrite Injection and Nithiodote carry Boxed Warnings for these serious adverse reactions.

FDA is aware of several unapproved drug products containing sodium nitrite or sodium thiosulfate labeled to treat cyanide poisoning. These unapproved drug products containing sodium nitrite or sodium thiosulfate are sold individually, as well as in cyanide antidote kits. Unapproved cyanide antidote kits may also contain other unapproved drugs (e.g., amyl nitrite) or medical products (e.g., syringes) that are intended for potential use with sodium nitrite and sodium thiosulfate. This notice is issued under sections 502 (21 U.S.C. 352) and 505 of the FD&C Act and applies to unapproved injectable drug products containing sodium nitrite or sodium thiosulfate labeled to treat cyanide poisoning that are currently being manufactured or distributed.

II. Safety Concerns With Unapproved New Drugs

Because marketed unapproved new drug products have not been through FDA's approval process, there are safety risks associated with them. Some unapproved drug product labeling omits safety warnings, such as the Boxed Warnings required on Sodium Nitrite Injection and Nithiodote, which are important for safe use of the drug products. Without these warnings, the unapproved drug products may be used in inappropriate circumstances or without appropriate monitoring, posing an increased risk to public health. Patients being treated for cyanide poisoning require close monitoring and may require repeat doses of antidote, supplemental oxygen, and ventilatory support. Cyanide antidotes containing sodium nitrite or amyl nitrite may induce methemoglobinemia, which may require additional treatment.

The expected risks associated with use of sodium nitrite or sodium thiosulfate drug products are also potentially greater for unapproved drug products because the quality, safety, and efficacy of unapproved formulations have not been demonstrated to FDA. For example, information on the ingredients and data on the bioavailability of unapproved drug products have not been submitted for FDA review, nor has FDA had the opportunity to assess the adequacy of their chemistry, manufacturing, and control specifications. Also, unapproved drug products have unapproved labeling that may not contain appropriate dosing information. For example, the sodium thiosulfate component of Nithiodote is dosed for children based on body weight or body surface area, whereas FDA is aware of unapproved sodium thiosulfate products labeled for use in children at a lower dose based only on body surface area. Such discrepancies in dosing may lead to underdosing of sodium thiosulfate in children.

III. Legal Status of Products Identified in This Notice

FDA has reviewed the publicly available scientific literature for unapproved injectable sodium nitrite and sodium thiosulfate products labeled for treatment of cyanide poisoning. In no case did FDA find literature sufficient to support a determination that any of these drug products are generally recognized as safe and effective. Therefore, these products are ''new drugs'' within the meaning of section 201(p) of the FD&C Act (21 U.S.C. 321(p)), and they require approved NDAs or ANDAs in order to be legally marketed.

Also, the unapproved drug products covered by this notice are labeled for prescription use. Prescription drugs are defined under section 503(b)(1)(A) of the FD&C Act (21 U.S.C. 353(b)(1)(A)) as drugs that, because of their toxicity or other potentiality for harmful effect, are not safe to use except under the supervision of a practitioner licensed by law to administer such drugs. Because any drug product covered by this notice meets the definition of ''prescription drug'' in 503(b)(1)(A), adequate directions cannot be written for it so that a layman can use the product safely for its intended uses (21 CFR 201.5). Consequently, it is misbranded under section 502(f)(1) of the FD&C Act in that it fails to bear adequate directions for use. An approved prescription drug is exempt from the requirement in section 502(f)(1) that it bear adequate direction for use if, among other things, it bears the NDA-approved labeling (21 CFR 201.100(c)(2) and 21 CFR 201.115). Because the unapproved prescription drug products subject to this notice do not have approved applications with approved labeling, they fail to qualify for the exemptions to the requirement that they bear ''adequate directions for use,'' and they are misbranded under section 502(f)(1).

IV. Notice of Intent To Take Enforcement Action

Although not required to do so by the Administrative Procedure Act, the FD&C Act (or any rules issued under its authority), or for any other legal reason, FDA is providing this notice to persons [1] who are marketing unapproved and misbranded drug products containing sodium nitrite and sodium thiosulfate labeled to treat cyanide poisoning, either sold individually or as part of a kit. The Agency intends to take enforcement action against such products and those who manufacture them or cause them to be manufactured or shipped in interstate commerce. In the event that unapproved sodium nitrite and sodium thiosulfate are packaged in a kit with other unapproved drugs (e.g., amyl nitrite) or medical products (e.g., syringes) and labeled for treatment of cyanide poisoning, FDA intends to take action against the entire kit based on the unapproved sodium thiosulfate and sodium nitrite components.

Manufacturing or shipping the drug products covered by this notice can result in enforcement action, including seizure, injunction, or other judicial or administrative proceeding. Consistent with policies described in the Agency's guidance entitled ''Marketed Unapproved Drugs—Compliance Policy Guide'' (the Marketed Unapproved Drugs CPG) (*http://www.fda.gov/downloads/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/UCM070290.pdf*), the Agency does not expect to issue a warning letter or any other further warning to firms marketing drug products covered by this notice before taking enforcement action. The Agency also reminds firms that, as stated in the Marketed Unapproved Drugs CPG, any unapproved drug marketed without a required approved application is subject to Agency enforcement action at any time. The issuance of this notice does not in any way obligate the Agency to issue similar notices (or any notice) in the future regarding marketed unapproved drugs. As described in the Marketed Unapproved Drugs CPG, the Agency may, at its discretion, identify a period of time during which the Agency does not intend to initiate an enforcement action against a currently marketed unapproved drug solely on the grounds that it lacks an approved application under section 505 of the FD&C Act. With respect to drug products covered by this notice, the Agency intends to exercise its enforcement discretion for only a limited period of time because there are safety risks with respect to the products covered by this notice, and there are FDA-approved drug products to meet patient needs. Therefore, the Agency intends to implement this notice as follows.

For the effective date of this notice, see the **DATES** section of this document. Any drug product covered by this notice that a company (including a manufacturer or distributor) began marketing after September 19, 2011, is subject to immediate enforcement action. For products covered by this notice that a company (including a manufacturer or distributor) began marketing in the United States on or before September 19, 2011, FDA intends to take enforcement action against any such product that is not listed with the Agency in full compliance with section 510 of the FD&C Act (21 U.S.C. 360) before November 27, 2012, and is manufactured, shipped, or otherwise introduced or delivered for introduction into interstate commerce by any person on or after November 27, 2012. FDA also intends to take enforcement action against any drug product covered by this notice that is listed with FDA in full compliance with section 510 of the FD&C Act but is not being commercially used or sold [2] in the United States before November 27, 2012 and that is manufactured, shipped, or otherwise introduced or delivered for introduction into interstate commerce by any person on or after November 28, 2012.

However, for drug products covered by this notice that a company (including a manufacturer or distributor) began marketing in the United States on or before September 19, 2011, are listed with FDA in full compliance with section 510 of the FD&C Act before November 27, 2012 (''currently marketed and listed''), and are manufactured, shipped, or otherwise introduced or delivered for introduction into interstate commerce by any person on or after November 28, 2012 the Agency intends to exercise its

[1] The term *person* includes individuals, partnerships, corporations, and associations (21 U.S.C. 321(e)).

[2] For purposes of this notice, the phrase ''commercially used or sold'' means that the product has been used in a business or activity involving retail or wholesale marketing and/or sale.

enforcement discretion as follows: FDA intends to initiate enforcement action against any such currently marketed and listed product that is manufactured on or after February 26, 2013, or that is shipped on or after May 28, 2013. Further, FDA intends to take enforcement action against any person who manufactures or ships such products after these dates. Any person who has submitted or submits an application for a drug product covered by this notice but has not received approval must comply with this notice.

The Agency, however, does not intend to exercise its enforcement discretion as outlined previously if the following apply: (1) A manufacturer or distributor of drug products covered by this notice is violating other provisions of the FD&C Act, including, but not limited to, violations related to FDA's current good manufacturing practice, adverse event reporting, labeling, or misbranding requirements other than those identified in this notice, or (2) it appears that a firm, in response to this notice, increases its manufacture or interstate shipment of drug products covered by this notice above its usual volume during these periods.[3]

Nothing in this notice, including FDA's intent to exercise its enforcement discretion, alters any person's liability or obligations in any other enforcement action, or precludes the Agency from initiating or proceeding with enforcement action in connection with any other alleged violation of the FD&C Act, whether or not related to a drug product covered by this notice. Similarly, a person who is or becomes enjoined from marketing unapproved or misbranded drugs may not resume marketing of such products based on FDA's exercise of enforcement discretion as described in this notice.

Drug manufacturers and distributors should be aware that the Agency is exercising its enforcement discretion as described previously only in regard to drug products covered by this notice that are marketed under a National Drug Code number listed with the Agency in full compliance with section 510 of the FD&C Act before November 27, 2012. As previously stated, drug products covered by this notice that are currently marketed but not listed with the Agency on the date of this notice must, as of the effective date of this notice, have approved applications before their shipment in interstate commerce. Moreover, any person or firm that has submitted or submits an application but has yet to receive approval for such products is still responsible for full compliance with this notice.

V. Discontinued Products

Some firms may have previously discontinued the manufacturing or distribution of products covered by this notice without removing them from the listing of their products under section 510(j) of the FD&C Act. Other firms may discontinue manufacturing or distributing listed products in response to this notice. Firms that wish to notify the Agency of product discontinuation should send a letter, signed by the firm's chief executive officer, fully identifying the discontinued product(s), including NDC number(s), and stating that the manufacturing and/or distribution of the products has (have) been discontinued. The letter should be sent electronically to Lori Cantin (see **ADDRESSES**). Firms should also electronically update the listing of their products under section 510(j) of the FD&C Act to reflect discontinuation of products covered by this notice. Questions on electronic drug listing updates should be sent to: *eDRLS@fda.hhs.gov.* FDA plans to rely on its existing records, including its drug listing records, the results of any subsequent inspections, or other available information, when it targets violations for enforcement action.

Dated: November 20, 2012.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2012–28773 Filed 11–27–12; 8:45 am]

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[3] If FDA finds it necessary to take enforcement action against a product covered by this notice, the Agency may take action relating to all of the defendant's other violations of the FD&C Act at the same time. For example, if a firm continues to manufacture or market a product covered by this notice after the applicable enforcement date has passed, to preserve limited Agency resources, FDA may take enforcement action relating to all of the firm's unapproved drugs that require applications at the same time (see, e.g., *United States* v. *Sage Pharmaceuticals,* 210 F.3d 475, 479–480 (5th Cir. 2000) (permitting the Agency to combine all violations of the FD&C Act in one proceeding, rather than taking action against multiple violations of the FD&C Act in ''piecemeal fashion'')).

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2012–D–0276]

Guidance for Industry: Enforcement Policy Concerning Rotational Warning Plans for Smokeless Tobacco Products; Withdrawal of Guidance

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; withdrawal.

SUMMARY: The Food and Drug Administration (FDA) is announcing the withdrawal of a guidance entitled ''Enforcement Policy Concerning Rotational Warning Plans for Smokeless Tobacco Products,'' that was announced in the **Federal Register** on June 8, 2010.

DATES: The withdrawal is effective November 28, 2012.

FOR FURTHER INFORMATION CONTACT: Ele Ibarra-Pratt, Center for Tobacco Products, Office of Compliance and Enforcement, Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850–3229, 1–877–287–1373, *CTPCompliance@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: On June 22, 2009, the President signed the Family Smoking Prevention and Tobacco Control Act (Pub. L. 111–31) (Tobacco Control Act) into law. Section 204 of the Tobacco Control Act amended section 3 of the Comprehensive Smokeless Tobacco Health Education Act of 1986 (Smokeless Tobacco Act), 15 U.S.C. 4402, to prescribe revised requirements for health warning statements that must appear on smokeless tobacco product packages and advertisements, and to require the submission of warning plans for smokeless tobacco product packages and advertisements to FDA for review and approval, rather than to the Federal Trade Commission (FTC). Section 3(b)(3) of the Smokeless Tobacco Act requires the equal distribution and display of warning statements on packaging, and the quarterly rotation of warning statements in advertising, for each brand of smokeless tobacco product ''in accordance with a plan submitted by the tobacco product manufacturer, importer, distributor, or retailer'' to, and approved by, FDA. These requirements took effect on June 22, 2010.

In a notice published in the **Federal Register** of June 8, 2010 (75 FR 32481), FDA announced the availability of a guidance entitled ''Enforcement Policy Concerning Rotational Warning Plans for Smokeless Tobacco Products.'' This guidance provided information to industry and the public, including that ''[a]t this time, as an exercise of enforcement discretion, FDA does not intend to commence or recommend enforcement of the requirement that a smokeless tobacco manufacturer, distributor, importer, or retailer must have an FDA-approved rotational warning plan, so long as a rotational warning plan has been submitted to FDA by July 22, 2010.'' FDA believed that allowing additional time for the review of warning plans would permit an orderly transition of regulatory authority from the FTC to FDA to review and approve warning plans.

FDA is withdrawing this guidance because it is no longer warranted. FDA has completed its review of all of the warning plans for smokeless tobacco products that were submitted to FDA by July 22, 2010, and the transition from FTC to FDA of the responsibility for reviewing warning plans for smokeless tobacco products has been accomplished. Further, this guidance included an incomplete definition of smokeless tobacco. Section 101(c) of the Tobacco Control Act amended the Smokeless Tobacco Act to give smokeless tobacco the meaning that term is given by section 900(18) of the Federal Food, Drug, and Cosmetic Act. Under this definition, ''smokeless tobacco'' means any tobacco product that consists of cut, ground, powdered, or leaf tobacco and that is intended to be placed in the oral *or nasal* cavity. (Emphasis added) Thus, withdrawal of this guidance on enforcement policy will also help to prevent any confusion that may have been created by the misstatement of this definition.

For information regarding the submission of warning plans for smokeless tobacco products, you may contact the Office of Compliance at FDA's Center for Tobacco Products (see **FOR FURTHER INFORMATION CONTACT**).

We note that FDA has made available for public comment a draft guidance that, when finalized, will represent the Agency's current thinking on the ''Submission of Warning Plans for Cigarettes and Smokeless Tobacco Products.'' You can obtain an electronic version of this draft guidance document at either *http://www.regulations.gov/* or *http://www.fda.gov/TobaccoProducts/GuidanceComplianceRegulatoryInformation/default.htm*. You can comment on this or any other guidance at any time.

Dated: November 21, 2012.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2012–28809 Filed 11–27–12; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2012–N–1154]

Framework for Pharmacy Compounding: State and Federal Roles

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of public meeting; request for comments.

SUMMARY: The Food and Drug Administration (FDA) is announcing the following public meeting entitled ''Framework for Pharmacy Compounding: State and Federal Roles.'' At this public meeting, FDA and State representatives will share their perspectives.

Date and Time: The public meeting will be held on December 19, 2012, from 3 p.m. to 5 p.m. Onsite registration will be on a first-come, first-served basis beginning at 2 p.m.

Location: The public meeting will be held at the FDA White Oak Campus, 10903 New Hampshire Ave., Building 31 Conference Center, the Great Room (Rm. 1503), Silver Spring, MD 20993.

Entrance for the public meeting participants (non-FDA employees) is through Building 1 where routine security check procedures will be performed. For parking and security information, please refer to *http://www.fda.gov/AboutFDA/WorkingatFDA/BuildingsandFacilities/WhiteOakCampusInformation/ucm241740.htm.*

If you need special accommodations due to a disability, please contact Steve Morin, FDA Office of Special Health Issues, 301–796–0161, email: *Steve.Morin@fda.hhs.gov* no later than December 14, 2012.

Contact Person: Patricia Kuntze, Food and Drug Administration, 10903 New H Ave., Bldg. 32, Rm. 5322, Silver Spring, MD 20993; *patricia.kuntze@fda.hhs.gov*.

Streaming Webcast of the Meeting: This public meeting will also be Webcast. Persons interested in viewing the Webcast should use the access connection at *https://collaboration.fda.gov/pharmacycompounding/.* The Webcast will begin on December 19, 2012, at 3 p.m. ET.

If you have never attended a Connect Pro meeting before, test your connection at: *https://collaboration.fda.gov/common/help/en/support/meeting_test.htm.* Get a quick overview at: *http://www.adobe.com/go/connectpro_overview.* Adobe, the Adobe logo, Acrobat and Acrobat Connect are either registered trademarks or trademarks of Adobe Systems Incorporated in the United States and/or other countries.

If for some reason the test page does not work, that is not a definite indicating factor that the actual Webcast will not work. The test link sometimes appears to be broken on some individuals' computers. (FDA has verified the Web site addresses in this document, but FDA is not responsible for any subsequent changes to the Web sites after this document publishes in the **Federal Register**.)

This Webcast will be closed captioned.

Comments: In order to obtain public comment, FDA is also soliciting either electronic or written comments on the issues discussed in section II of this document. The deadline for submitting comments is January 18, 2013.

Regardless of attendance at the meeting, interested persons may submit either written comments regarding this document to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852 or electronic comments to *http://www.regulations.gov.* It is only necessary to send one set of comments. Identify comments with the docket number found in brackets in the heading of this document. In addition, when submitting comments on issues as outlined in section II of this document, please identify the issue you are addressing. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday, and will be posted to the docket at *http://www.regulations.gov.*

Transcripts: Please be advised that as soon as a transcript is available, it will be accessible at *http://www.regulations.gov.* It may be viewed at the Division of Dockets Management (see *Comments*). A transcript will also be available in either hardcopy or on CD–ROM, after submission of a Freedom of Information request. Written requests are to be sent to the Division of Freedom of Information (ELEM–1029), Food and Drug Administration, 12420 Parklawn Dr., Element Bldg., Rockville, MD 20857.

SUPPLEMENTARY INFORMATION:

I. Background

The recent outbreak of fungal meningitis associated with drugs produced and sold by New England Compounding Center has raised serious questions about the regulation of pharmacy compounding (Refs. 1 and 2). Historically, regulation of pharmacy compounding has focused on drawing a line between traditional pharmacy compounding and other manufacturing. Generally, day-to-day oversight of traditional pharmacy compounding has been seen as the primary responsibility of the States, which license pharmacies and regulate the practice of pharmacy, while other manufacturing falls under the purview of FDA. Going forward, FDA believes the focus should be shifted from attempting to draw a bright line between traditional pharmacy compounding and other manufacturing to clearly defining traditional pharmacy

compounding that should be primarily overseen by the States and higher risk non-traditional pharmacy compounding that would require compliance with Federal standards. In addition, there are open questions about whether, and to what degree States should enforce Federal standards, what that oversight should look like, and the appropriate level of communication and coordination required to make the system of State and Federal oversight seamless and effective.

FDA recognizes that the States play a critical role in the oversight of traditional pharmacy compounding, which can include compounding a customized medication in response to a prescription by a licensed practitioner based on the identified medical need of a particular patient for the compounded product. However, a category of ''non-traditional'' compounding has evolved in the last decade that FDA believes requires additional oversight. The Agency is working with Congress to consider new authorities regarding ''non-traditional'' compounding pharmacies. In recognition of the States' role, FDA has also reached out to its State partners by inviting representatives from all 50 States to an intergovernmental meeting.

II. Questions for Comment

The intergovernmental meeting will be an opportunity for the State officials to discuss a variety of issues regarding their views on the role of the FDA and the States in the oversight of compounding including:

- Given existing authorities and resources, are the States currently able to provide the needed oversight of pharmacy compounding and consumer protection?
- What should the Federal role be in regulating higher risk pharmacy compounding such as compounding high-volumes of drugs for interstate distribution? Is there a way to re-balance Federal and State participation in the regulation of pharmacy compounding that would better protect the public health? What strategies should be developed to further strengthen Federal/State communications?
- Do you see a role for the States in enforcing a Federal standard for ''non-traditional'' compounding? If so, what role? What factors would affect a decision by your State to take on such responsibility?

The public meeting announced in this document will be held after the intergovernmental meeting described above. FDA is holding this public meeting to share the results of the intergovernmental meeting with interested stakeholders. At the public meeting, FDA representatives and participants from the intergovernmental meeting will summarize the results of the intergovernmental meeting.

III. References

The following references have been placed on display in the Division of Dockets Management (see **ADDRESSES**) and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday. (FDA has verified the Web site addresses, but is not responsible for any subsequent changes to the Web sites after this document publishes in the **Federal Register**.)

1. The Fungal Meningitis Outbreak: Could It Have Been Prevented? Statement of Margaret A. Hamburg, M.D., before the House Committee on Energy and Commerce, Subcommittee on Oversight and Investigations (*http://www.fda.gov/NewsEvents/Testimony/ucm327664.htm*), November 14, 2012.

2. Pharmacy Compounding: Implications of the 2012 Meningitis Outbreak: Margaret A. Hamburg, M.D., before the Senate Committee on Health, Education, Labor, and Pensions (*http://www.fda.gov/NewsEvents/Testimony/ucm327667.htm*), November 15, 2012.

Dated: November 21, 2012.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2012–28786 Filed 11–27–12; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2012–0027; OMB No. 1660–0054]

Agency Information Collection Activities: Submission for OMB Review; Comment Request, Assistance to Firefighters Grant Program-Grant Application Supplemental Information

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: The Federal Emergency Management Agency (FEMA) has submitted the following information collection to the Office of Management and Budget (OMB) for review and clearance in accordance with the requirements of the Paperwork Reduction Act of 1995. The submission describes the nature of the information collection, the categories of respondents, the estimated burden (*i.e.,* the time, effort and resources used by respondents to respond) and cost, and includes the actual data collection instruments FEMA will use.

There has been a change in the respondents, estimated burden, and estimated total annual burden hours from previous 30 day Notice. This change is a result of including the time, effort, and resources to collect information to be used by respondents as well as the significant decline in respondents expected.

DATES: Comments must be submitted on or before December 28, 2012.

ADDRESSES: Submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the Desk Officer for the Department of Homeland Security, Federal Emergency Management Agency, and sent via electronic mail to *oira.submission@omb.eop.gov* or faxed to (202) 395–5806.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection should be made to Director, Records Management Division, 1800 South Bell Street, Arlington, VA 20598–3005, facsimile number (202) 646–3347, or email address *FEMA-Information-Collections-Management@dhs.gov.*

SUPPLEMENTARY INFORMATON:

Collection of Information

Title: Assistance to Firefighters Grant Program-Grant Application Supplemental Information.

Type of Information Collection: Revision of a currently approved information collection.

OMB Number: OMB No. 1660–0054.

FEMA Forms: FEMA Form 080–2, AFG Application (General Questions and Narrative); FEMA Form 080–2a, Activity Specific Questions for AFG Vehicle Applicants; F FEMA Form 080–2b, Activity Specific Questions for AFG Operations and Safety Applications; FEMA Form 080–3, Activity Specific Questions for Fire Prevention and Safety Applicants; FEMA Form 080–3a, Fire Prevention and Safety; and FEMA Form 080–3b, Research and Development

Abstract: The FEMA forms for this collection are used to objectively evaluate each of the anticipated applicants to determine which applicants' submission in each of the AFG activities are close to the established program priorities. FEMA also uses the information to determine eligibility and whether the proposed use

of funds meets the requirements and intent of AFG legislation.

Affected Public: State, Local or Tribal Government, and Not-for-profit institutions.

Estimated Number of Respondents: 28,010.

Estimated Total Annual Burden Hours: 201,130 hours.

Frequency of Response: One Time.

Dated: November 21, 2012.

Charlene D. Myrthil,

Director, Records Management Division, Mission Support Bureau, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2012–28841 Filed 11–27–12; 8:45 am]

BILLING CODE 9111–78–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R1–R–2012–N114; 1265–0000–10137–S3]

Dungeness National Wildlife Refuge, Clallam County, WA; Comprehensive Conservation Plan and Environmental Assessment

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability; request for comments.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce the availability of a draft comprehensive conservation plan and environmental assessment (Draft CCP/EA) for Dungeness National Wildlife Refuge (refuge or NWR) for public review and comment. The Draft CCP/EA describes our proposal for managing the refuge for the 15 years following approval of the final CCP. Implementing the CCP is subject to the availability of funding and any other compliance regulations.

DATES: To ensure consideration, please send your written comments by December 28, 2012.

ADDRESSES: You may submit comments or requests for copies or more information by any of the following methods. You may request hard copies or a CD–ROM of the documents.

Email: FW1PlanningComments@fws.gov. Include ''Dungeness NWR draft CCP'' in the subject line of the message.

Fax: Attn: Project Leader, (360) 457–9778.

U.S. Mail: Washington Maritime National Wildlife Refuge Complex, 715 Holgerson Road, Sequim, WA 98382.

Web site: http://www.fws.gov/pacific/planning/main/docs/wa/docsdungeness.htm.

In-Person Drop-off, Viewing, or Pickup: Call (360) 457–8451 to make an appointment (necessary for viewing/pickup only) during regular business hours at the above address. For more information on locations for viewing or obtaining documents, see ''Public Availability of Documents'' under **SUPPLEMENTARY INFORMATION.**

FOR FURTHER INFORMATION CONTACT: Kevin Ryan, Project Leader, Washington Maritime National Wildlife Refuge Complex, 715 Holgerson Road, Sequim, WA 98382; phone (360) 457–8451 and fax (360) 457–9778.

SUPPLEMENTARY INFORMATION:

Introduction

With this notice, we continue the CCP process for Dungeness NWR in Clallam County, Washington. We started this process through a notice in the **Federal Register** (76 FR 61378; October 4, 2011). For more information about the history of the refuge, see that notice.

Background

The CCP Process

The National Wildlife Refuge System Administration Act of 1966, 16 U.S.C. 668dd–668ee (Refuge Administration Act), as amended by the National Wildlife Refuge System Improvement Act of 1997, 111 Stat. 1254, requires us to develop a CCP for each national wildlife refuge. The purpose for developing a CCP is to provide refuge managers with a 15-year plan for achieving refuge purposes and contributing toward the mission of the National Wildlife Refuge System (NWRS), consistent with sound principles of fish and wildlife management, conservation, legal mandates, the National Environmental Policy Act (NEPA), and our policies. In addition to outlining broad management direction on conserving wildlife and their habitats, CCPs identify compatible wildlife-dependent recreational opportunities available to the public, including opportunities for hunting, fishing, wildlife observation and photography, and environmental education and interpretation. We will review and update the CCP at least every 15 years in accordance with the Refuge Administration Act.

Public Outreach

We began public outreach by publishing a notice of intent in the **Federal Register** (76 FR 61378; October 4, 2011) announcing our intent to complete a CCP and EA for the refuge and inviting public comments. In October 2011, we distributed Planning Update 1, which included background information on the refuge; refuge purposes; preliminary issues, vision, and goals; and a request for public comments. Some scoping comments we received were about broad or long-range issues, while others suggested very specific or detailed strategies that could be used to achieve biological or public use objectives. The comments were categorized into eight general categories: Threats to refuge resources; wildlife and habitat management; wildlife-dependent public use; non-wildlife-dependent public use; law enforcement; cultural resources; land acquisition; and refuge administration.

We reviewed and evaluated the potential issues, management concerns, and opportunities that we, our partners, and the public identified during scoping. We used this information to define the major issues to be addressed in the CCP/EA. Preliminary draft alternatives were then developed to address these issues and meet the goals and objectives of the refuge. In January 2012, we distributed Planning Update 2, which included a summary of the scoping comments we received, a summary of our preliminary draft alternatives, notice of public open house meetings, and information on how and where to comment. On January 19 and February 2, 2012, we held a total of four public open house meetings in Sequim, Washington, to meet the public, present our preliminary draft alternatives, and solicit comments. The meetings were announced through local media outlets, on the refuge's Web site, and in Planning Update 2. Comments we received have been considered and evaluated, with many incorporated into the various alternatives addressed in the draft CCP/EA.

Draft CCP/EA Alternatives We Are Considering

During the public scoping process with which we started work on this draft CCP, we, other governmental partners, Tribes, and the public raised several issues, which the draft CCP addresses. A full description of each alternative is in the EA. To address these issues, we developed and evaluated the following alternatives, briefly summarized below.

Common to All Alternatives

The New Dungeness Light Station, within the approved refuge boundary, is due to be excessed by the U.S. Coast Guard (USCG). Under all alternatives, the Service would work with the USCG to bring the light station property into the NWRS either through interagency cooperative management agreement or property transfer. Subsequently, the

Service proposes to enter into an agreement with the New Dungeness Light Station Association to continue their management and maintenance of the light station facilities.

Alternative A: No Action

Under Alternative A, the refuge would continue with current management, which focuses on protecting and maintaining habitats in their current condition. Fire suppression techniques would continue to be used to prevent catastrophic wildfire. Wetland and forested habitats would continue to be monitored for invasive species, and treated with Integrated Pest Management techniques as funding allows. The water delivery system on the Dawley Unit would be maintained to deliver water to the impoundment. Access on roads within the Dawley Unit would be maintained. Partnerships would continue to be cultivated for oil spill response and to address water quality issues within Dungeness Bay and Harbor. Limited data would be collected on birds, vegetation, invasive species, and marine debris, with no specific effectiveness monitoring conducted for habitats or wildlife. Research would continue under Special Use Permits. Areas that are open for public use year-round, areas that are open only seasonally depending on the needs of refuge wildlife, and areas that are closed to visitors year-round for the benefit of wildlife would remain the same. Public-use activities on the refuge would include fishing (saltwater), shell-fishing (clams and crabs), wildlife observation, wildlife photography, hiking, boating (no wake allowed), jogging, horseback riding, beach use (wading, beachcombing, other recreational beach uses), environmental education, and environmental interpretation.

Alternative B: Preferred Alternative

The Service's Preferred Alternative would continue many of the activities in Alternative A, but would also expand the level of active habitat management and enhancement that the Service would conduct. A forest assessment would be conducted within the Dawley Unit and a step-down forest management plan would be completed by 2018. Active forest management techniques would be employed within a core 40-acre area to promote the development of old-growth forest. A road inventory and condition assessment for the Dawley Unit would be completed by 2016. The slope along the main road would be stabilized, but the overall amount of road maintained would decrease and unneeded logging spur roads outside of the core area would be rehabilitated. A wetland inventory and hydrological assessment would be conducted by 2015. The impoundment at the Dawley Unit would be managed for optimum water levels and benthic layer characteristics for amphibians. In addition to existing status monitoring and research, data would be collected on a greater variety of flora and fauna. Environmental factors that are stressors, climate-change related or otherwise, would be monitored. Effectiveness monitoring of CCP and other step-down plan objectives would occur. Public-use changes would include new limits on boat landing hours. Additional wildlife viewing, interpretive, and environmental education programs would be offered. Staff and volunteer time devoted to making visitor contacts would be increased. New orientation, guidance, and regulatory signage and materials would be developed. The existing uses of jogging and horseback riding were evaluated and our draft analysis has found that jogging is not appropriate due to wildlife disturbance and therefore would no longer be allowed. We also have preliminarily determined that horseback riding should no longer be allowed due to safety concerns and user conflicts.

Alternative C

All additional habitat monitoring and management activities included in Alternative B are also included in this alternative, as are effectiveness monitoring and research identification, and pursuit of partnerships to accomplish these activities. However, forest management within the Dawley Unit would be further expanded to include minimal management activities (e.g., planting berry-producing shrubs) within an additional 30–40 acres outside of the core area. Unneeded logging spur roads within this area would also be rehabilitated. Public use opportunities and programs under Alternative C are similar to Alternative B but smaller and more restricted in some cases. Limits on boat landing hours under Alternative C are the same as under Alternative B. Wildlife viewing, interpretive, and environmental education programs would be slightly more frequent under Alternative C compared to Alternative A but slightly less frequent compared to Alternative B. Similar to Alternative B, jogging is found to be not appropriate due to wildlife disturbance and therefore would no longer be allowed. Horseback riding would not be allowed due to safety concerns and user conflicts.

Public Availability of Documents

In addition to any methods in **ADDRESSES**, you can view or obtain documents in the following ways: by calling the refuge complex at 360–457–8451 or visiting our Web site at *http://www.fws.gov/pacific/planning/main/docs/wa/docsdungeness.htm.* Printed copies will be available for review at the following libraries:

- North Olympic Public Library—Sequim Branch, 630 N. Sequim Ave., Sequim, WA 98382
- North Olympic Public Library—Port Angeles Branch, 2210 South Peabody St., Port Angeles, WA 98362
- Port Townsend Public Library, 1220 Lawrence Street, Port Townsend, WA 98368
- Jefferson County Central Library, 620 Cedar Ave., Port Hadlock, WA 98339

Submitting Comments/Issues for Comment

Public comments are requested, considered, and incorporated throughout the planning process. Public participation is vital to this planning effort. Comments on the draft CCP/EA will be analyzed by the Service and addressed in the final planning documents.

Public Availability of Comments

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated: August 6, 2012.

Robyn Thorson

Regional Director, Pacific Region, U.S. Fish and Wildlife Service.

[FR Doc. 2012–28753 Filed 11–27–12; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[Docket No. FWS–R9–IA–2011–0087; 96300–1671–0000 FY12 R4]

Conference of the Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES); Sixteenth Regular Meeting; Public Meeting

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of meeting date change.

SUMMARY: The United States, as a Party to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), will attend the sixteenth regular meeting of the Conference of the Parties to CITES (CoP16) in Bangkok, Thailand, during March 3 to 15, 2013. Currently, the United States is developing its negotiating positions on proposed resolutions, decisions, and amendments to the CITES Appendices (species proposals), as well as other agenda items that have been submitted by other Party countries, the permanent CITES committees, and the CITES Secretariat for consideration at CoP16. In a notice published on November 9, 2012, we announced a public meeting to be held on December 5, 2012, to discuss the items on the provisional agenda for CoP16. This notice revises the previously announced date of the public meeting.

DATES: The public meeting will be held on December 13, 2012, at 1:30 p.m.

ADDRESSES: The public meeting will be held in the Sidney Yates Auditorium at the Main Interior Building at 18th and C Streets NW., Washington, DC. Directions to the building can be obtained by contacting the Division of Management Authority (see **FOR FURTHER INFORMATION CONTACT**). For more information about the meeting, see ''Announcement of Public Meeting'' under **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: Robert R. Gabel, Chief, Division of Management Authority; telephone 703–358–2095; facsimile 703–358–2298.

SUPPLEMENTARY INFORMATION:

Background

The Convention on International Trade in Endangered Species of Wild Fauna and Flora, hereinafter referred to as CITES or the Convention, is an international treaty designed to control and regulate international trade in certain animal and plant species that are now or potentially may become threatened with extinction. These species are listed in Appendices to CITES, which are available on the CITES Secretariat's Web site at *http://www.cites.org/eng/app/index.php.* Currently, 176 countries, including the United States, are Parties to CITES. The Convention calls for regular biennial meetings of the Conference of the Parties, unless the Conference of the Parties decides otherwise. At these meetings, the Parties review the implementation of CITES, make provisions enabling the CITES Secretariat in Switzerland to carry out its functions, consider amendments to the lists of species in Appendices I and II, consider reports presented by the Secretariat and the permanent CITES committees (Standing, Animals, and Plants Committees), and make recommendations for the improved effectiveness of CITES. Any country that is a Party to CITES may propose amendments to Appendices I and II, resolutions, decisions, and agenda items for consideration by all the Parties at the meetings.

On November 9, 2012, we published a notice in the **Federal Register** (77 FR 67390) that announced the provisional agenda for CoP16, solicited comments on the items on the provisional agenda, and announced a public meeting to discuss the items on the provisional agenda. In that notice, we announced that the public meeting would be held on December 5, 2012, in the Sidney Yates Auditorium at the Main Interior Building at 18th and C Streets NW., Washington, DC. The date of that public meeting has now been changed. The public meeting will be held on the date specified in the **DATES** section and at the address specified in the **ADDRESSES** section. You can obtain directions to the building by contacting the Division of Management Authority (see the **FOR FURTHER INFORMATION CONTACT** section above). Please note that the Sidney Yates Auditorium is accessible to the handicapped, and all persons planning to attend the meeting will be required to present photo identification when entering the building. Persons who plan to attend the meeting and who require interpretation for the hearing impaired must notify the Division of Management Authority by December 5, 2012. For those who cannot attend the public meeting but are interested in watching via live stream, please go to our Web site *http://www.fws.gov/international/cites/cop16/,* and look for the link to the live feed.

Future Actions

Through an additional notice and Web site posting in advance of CoP16, we will inform you about tentative U.S. negotiating positions on species proposals, proposed resolutions, proposed decisions, and agenda items that were submitted by other Party countries, the permanent CITES committees, and the CITES Secretariat for consideration at CoP16.

Author

The primary author of this notice is Mark Albert, Division of Management Authority.

Authority

This action is authorized by the U.S. Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: November 26, 2012.

Susan L. Wilkinson,

Alternate Federal Register Liaison.

[FR Doc. 2012–28897 Filed 11–26–12; 4:15 pm]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R8–ES–2013–N252: FF08ENVD00–FXES11130800000–134]

Proposed Low-Effect Habitat Conservation Plan for the Spring Mountain Raceway Expansion Project, Pahrump, Nye County, Nevada

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability; receipt of application and request for comment.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), have received an application from Spring Mountain Raceway, LLC (applicant), for an incidental take permit under the Endangered Species Act of 1973, as amended. The requested 4-year permit would authorize the incidental take of the threatened Mojave desert tortoise on 120 acres of habitat associated with the construction of a raceway expansion project in Pahrump, Nye County, Nevada. The applicant would implement conservation measures to avoid, minimize, and mitigate effects of the proposed project's covered activities, as described in the applicant's low-effect habitat conservation plan (HCP).

We request comments on the permit application, including the HCP, and our preliminary determination that the plan qualifies as a ''low-effect'' habitat conservation plan, eligible for a categorical exclusion under the National Environmental Policy Act of 1969, as amended (NEPA). We explain the basis for this determination in our environmental action statement (EAS), which is also available for public review.

DATES: We must receive written comments on or before December 27, 2012.

ADDRESSES: You may download a copy of the HCP, low-effect screening form and EAS, and related documents on the Internet at *http://www.fws.gov/nevada,* or you may request copies of the documents by U.S. mail or phone (see

below). Please address written comments to Edward D. Koch, State Supervisor, Nevada Fish and Wildlife Office, U.S. Fish and Wildlife Service, 1340 Financial Boulevard, Suite 234, Reno, NV 89502. You may also send comments by facsimile to 775–861–6301. Please note that your information request or comment is in reference to the Low-Effect Habitat Conservation Plan for the Spring Mountain Raceway Expansion Project, Pahrump, Nye County, Nevada.

FOR FURTHER INFORMATION CONTACT: Jeri Krueger, HCP Coordinator, at the above address, or by calling 775–861–6300.

SUPPLEMENTARY INFORMATION:

Availability of Documents

You may obtain copies of the permit application, HCP, and EAS from the individual listed under **FOR FURTHER INFORMATION CONTACT**. Copies of these documents are also available for public inspection, by appointment, during regular business hours, at the Nevada Fish and Wildlife Office, 4701 North Pines Drive, Las Vegas, NV 89130 (see **ADDRESSES**).

Public Availability of Comments

Before including your address, phone number, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—might be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Background Information

Section 9 of the Endangered Species Act of 1973, as amended (Act; 16 U.S.C. 1531 *et seq.*) and Federal regulations prohibit taking of fish and wildlife species listed as endangered or threatened under section 4 of the Act. Under the Act, the term ''take'' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. The term ''harm'' is defined in the regulations as significant habitat modification or degradation that results in death or injury of listed species by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering (50 CFR 17.3). The term ''harass'' is defined in the regulations as to carry out actions that create the likelihood of injury to listed species to such an extent as to significantly disrupt normal behavioral patterns, which include, but are not limited to, breeding, feeding, or sheltering (50 CFR 17.3).

However, under specified circumstances, the Service may issue permits that authorize the take of federally listed species, provided the take that occurs is incidental to, but not the purpose of, an otherwise lawful activity. Regulations governing permits for endangered and threatened species are at 50 CFR 17.22 and 17.32, respectively.

Section 10(a)(1)(B) of the Act contains provisions for issuing such permits to non-Federal entities for the take of endangered and threatened species, provided the following criteria are met:

1. The taking will be incidental;

2. The applicant will, to the maximum extent practicable, minimize and mitigate the impact of such taking;

3. The applicant will develop a habitat conservation plan and ensure that adequate funding for the plan will be provided;

4. The taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and

5. The applicant will carry out any other measures that the Service may require as being necessary or appropriate for the purposes of the habitat conservation plan.

The applicant is seeking a permit with a 4-year term for the incidental take of the Mojave desert tortoise (*Gopherus agassizii*). The applicant purchased a 120-acre parcel of property, immediately adjacent to their existing raceway facility, from the Bureau of Land Management (BLM) by modified competitive sealed-bid sale on May 7, 2012. The purpose of the acquisition was to expand the raceway by extending the racetrack and adding additional facilities on the property. The public sale of the parcel was in conformance with the BLM's Las Vegas Resource Management Plan (RMP), approved by record of decision on October 5, 1998. The applicant proposes to carry out construction activities associated with the expansion of the raceway on the 120-acre property. Construction of the raceway expansion area would include grading and leveling of soil and other earth-moving activities; removal of vegetation; construction of the new racetrack; construction of buildings and parking lots; construction of flood control facilities; installation of utilities such as power, phone, Internet, sewer, and water lines; and improvement and/or widening of adjacent roadways. The entire 120-acre parcel would be developed, resulting in the incidental take of all desert tortoises that may occupy the site and the permanent loss of 120 acres of desert tortoise habitat.

To avoid, minimize, and mitigate adverse effects to desert tortoise from the construction of the proposed raceway expansion project, the applicant proposes to fully implement the conservation measures described in the HCP. Conservation measures include: (1) Fencing the perimeter of the project area with desert tortoise-proof fencing; (2) surveying and removing all desert tortoises from the property by qualified desert tortoise biologists prior to the commencement of surface disturbing activities; (3) educating construction workers, employees, and customers on the status of the tortoise and measures that can be implemented to minimize impacts to tortoise; (4) ensuring trash and food items are disposed of properly to avoid attracting predators; and (5) providing funding in the amount of $550 per acre of habitat disturbed to the Desert Tortoise Conservation Center in Clark County, Nevada, to support development and implementation of conservation and recovery actions for the tortoise under the guidance of the Service's Desert Tortoise Recovery Office in Reno, Nevada.

Alternatives

Our proposed action is approving the applicant's HCP and issuing an incidental take permit for the applicant's covered activities. As required by the Act, the applicant's HCP considers alternatives to the take expected under the proposed action. The HCP considers the environmental consequences of one alternative to the proposed action, the No-Action Alternative. Under the No-Action Alternative, we would not issue a permit, incidental take of desert tortoise associated with development of the Spring Mountain Raceway Expansion project would not be authorized, and minimization and mitigation measures proposed by the applicant would not be implemented. The No-Action Alternative is considered infeasible because the property was identified for disposal under the BLM's RMP, the applicant purchased the property from the BLM for the sole purpose of expanding an existing raceway facility, and desert tortoise habitat occurs throughout the 120-acre property; therefore, development could not move forward without affecting the tortoise.

Under the Proposed-Action Alternative, we would issue an incidental take permit for the applicant's proposed project, which includes the covered activities described above. The Proposed-Action

Alternative would permanently disturb 120 acres of desert tortoise habitat that occurs adjacent to an existing raceway and is bounded on the south by a highway. To minimize and mitigate for these effects, the applicant proposes to implement the conservation measures described above and in the applicant's HCP.

National Environmental Policy Act

As described in our EAS, we have made the preliminary determination that approval of the proposed HCP and issuance of the permit would qualify as a categorical exclusion under NEPA (42 U.S.C. 4321–4347 *et seq.*), as provided by NEPA implementing regulations in the Code of Federal Regulations (40 CFR 1500,5(k), 1507.3(b)(2), 1508.4), by Department of Interior regulations (43 CFR 46.205, 46.210, 46.215), and by the Department of the Interior Manual (516 DM 3 and 516 DM 8). Our EAS determined that the proposed HCP qualifies as a ''low-effect'' habitat conservation plan, as defined by our Habitat Conservation Planning Handbook (November 1996). Determination of low-effect habitat conservation plans is based on the following three criteria: (1) Implementation of the proposed HCP would result in minor or negligible effects on federally listed, proposed, and candidate species and their habitats; (2) implementation of the proposed HCP would result in minor or negligible effects on other environmental values or resources; and (3) impacts of the HCP, considered together with the impacts of other past, present, and reasonably foreseeable similarly situated projects, would not result, over time, in cumulative effects to environmental values or resources that would be considered significant. Based upon the preliminary determinations in the EAS, we do not intend to prepare further NEPA documentation. We will consider public comments when making the final determination on whether to prepare an additional NEPA document on the proposed action.

Public Comments

We request data, comments, new information, or suggestions from the public, other concerned governmental agencies, the scientific community, Tribes, industry, or any other interested party on this notice. If you wish to comment on the permit application, EAS, or proposed HCP, you may submit your comments to the address listed in the **ADDRESSES** section of this document. If we determine that the requirements are met, we will issue an incidental take permit under section 10(a)(1)(B) of the Act to the applicant for take of the desert tortoise, incidental to otherwise lawful activities in accordance with the terms of the permit. We will make the final permit decision no sooner than 30 days after the date of this notice, and will fully consider all comments we receive during the comment period.

Authority

We provide this notice pursuant to section 10(c) of the Act and the NEPA public-involvement regulations (40 CFR 1500.1(b), 1500.2(d), and 1506.6).

Dated: November 20, 2012.

Edward D. Koch,

State Supervisor, Nevada Fish and Wildlife Office, Reno, Nevada.

[FR Doc. 2012–28843 Filed 11–27–12; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Geological Survey

[GX13C00BM6P2BB]

Agency Information Collection Activities: Comment Request

AGENCY: U.S. Geological Survey (USGS), Interior.

ACTION: Notice of an extension of an information collection (1028–0082).

SUMMARY: To comply with the Paperwork Reduction Act of 1995 (PRA), the U.S. Geological Survey (USGS) is inviting comments on an information collection request (ICR) that we have sent to the Office of Management and Budget (OMB) for review and approval. The ICR concerns the paperwork requirements for the ''Bird Banding and Recovery Reports.'' As required by the Paperwork Reduction Act (PRA) of 1995, and as part of our continuing efforts to reduce paperwork and respondent burden, we invite the general public and other Federal agencies to take this opportunity to comment on this ICR. This Information Collection is scheduled to expire on November 30, 2012.

DATES: Submit written comments by December 28, 2012.

ADDRESSES: Please submit comments on this information collection directly to the Office of Management and Budget (OMB), Office of Information and Regulatory Affairs, Attention: Desk Officer for the Department of the Interior via email: (*OIRA_SUBMISSION@omb.eop.gov*); or by fax (202) 395–5806; and identify your submission with #1028–0082. Please also submit a copy of your comments to Information Collection Clearance Officer, U.S. Geological Survey, 807 National Center, Reston, VA 20192 (mail); or *smbaloch@usgs.gov* (email). Please reference Information Collection 1028–0082.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Bruce Peterjohn, (301) 497–5646 (phone) or *bpeterjohn@usgs.gov* (email). You may also view additional information about this activity at: *www.reginfo.gov*.

SUPPLEMENTARY INFORMATION: *Title:* Bird Banding and Recovery Reports.

OMB Control Number: 1028–0082.

Type of Request: Extension of a currently approved collection.

Abstract: The USGS Bird Banding Laboratory is responsible for monitoring the trapping and marking of wild migratory birds by persons holding Federal permits. The Bird Banding laboratory collects information using three forms: (1) The Application for Federal Bird Marking and Salvage Permit, (2) The Bird Banding Permit Renewal Form, (3) The Bird Banding Recovery Report, and one electronic database, *Bandit*.

We will protect information from respondents considered proprietary under the Freedom of Information Act (5 U.S.C. 552) and its implementing regulations (43 CFR Part 2), and under regulations at 30 CFR 250.197, ''Data and information to be made available to the public or for limited inspection.'' No questions of a ''sensitive'' nature are asked.

Affected Public: General Public.

Respondent Obligation: The recovery report is voluntary. Reporting of banding information is required using the BANDIT software. The Permit application and renewal form are required to obtain or retain benefits.

Frequency of Collection: On occasion.

Estimated Number and Description of Respondents: 94,700 individuals encountering a banded bird and volunteer bird banders.

Annual Burden Hours: 21,068 hours (50 hours for permit applications, 19 hours for renewal applications, 2,999 hours for banding recovery reports, and 18,000 hours for the *Bandit* software).

Estimated Annual Reporting and Recordkeeping ''Hour'' Burden: We estimate the time to complete each form is: 30 minutes for the Permit Application form, 2 minutes for Bird Banding Permit renewal form, 2 minutes for Recovery Report form, and 4.5 hours for the *Bandit* software.

Estimated Reporting and Recordkeeping ''Non-Hour Cost'' Burden: We have not identified any

''non-hour cost'' burdens associated with this collection of information.

Public Disclosure Statement: The PRA (44 U.S.C. 3501, et seq.) provides that an agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

Comments: We are soliciting comments as to: (a) Whether the proposed collection of information is necessary for the agency to perform its duties, including whether the information is useful; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) how to enhance the quality, usefulness, and clarity of the information to be collected; and (d) how to minimize the burden on the respondents, including the use of automated collection techniques or other forms of information technology.

Please note that the comments submitted in response to this notice are a matter of public record. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment, including your personal identifying information, may be made publicly available at any time. While you can ask OMB in your comment to withhold your personal identifying information from public review, we cannot guarantee that it will be done.

Dated: November 20, 2012.

Bruce Peterjohn,

Chief, Bird Banding Lab, USGS.

[FR Doc. 2012–28812 Filed 11–27–12; 8:45 am]

BILLING CODE 4311–AM–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Renewal of Agency Information Collection for Tribal Self-Governance Program

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of submission to OMB.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, the Assistant Secretary—Indian Affairs is submitting to the Office of Management and Budget (OMB) a request for renewal for the collection of information for Tribal Self-Governance Program. The information collection is currently authorized by OMB Control Number 1076–0143, which expires November 30, 2012.

DATE: Interested persons are invited to submit comments on or before December 28, 2012.

ADDRESSES: You may submit comments on the information collection to the Desk Officer for the Department of the Interior at the Office of Management and Budget, by facsimile to (202) 395–5806 or you may send an email to: *OIRA_Submission@omb.eop.gov.* Please send a copy of your comments to Ken Reinfeld, Office of Self-Governance, 1951 Constitution Avenue NW., Mail Stop 355–G SIB, Washington, DC 20240; email: *Ken.Reinfeld@bia.gov.*

FOR FURTHER INFORMATION CONTACT: Ken Reinfeld, Senior Policy Analyst, (202) 208–5734. You may review the information collection request online at *http://www.reginfo.gov.* Follow the instructions to review Department of the Interior collections under review by OMB.

SUPPLEMENTARY INFORMATION:

I. Abstract

The Assistant Secretary—Indian Affairs is seeking comments on the information collection entitled ''Tribal Self-Governance Program, 25 CFR 1000,'' as we prepare to renew this collection as required by the Paperwork Reduction Act of 1995. The information collected will be used to establish requirements for entry into the pool of qualified applicants for Self-Governance and to meet reporting requirements of the Tribal Self-Governance Act.

II. Request for Comments

The BIA requests your comments on this collection concerning: (a) The necessity of this information collection for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) The accuracy of the agency's estimate of the burden (hours and cost) of the collection of information, including the validity of the methodology and assumptions used; (c) Ways we could enhance the quality, utility, and clarity of the information to be collected; and (d) Ways we could minimize the burden of the collection of the information on the respondents.

Please note that an agency may not conduct or sponsor, and an individual need not respond to, a collection of information unless it has a valid OMB Control Number.

It is our policy to make all comments available to the public for review at the location listed in the **ADDRESSES** section. Before including your address, phone number, email address or other personally identifiable information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

III. Data

OMB Control Number: 1076–0143.

Title: Tribal Self-Governance program, 25 CFR 1000.

Brief Description of Collection: The Self-Governance program is authorized by the Tribal Self-Governance Act of 1994, Public Law 103–413 (the Act), as amended. Indian tribes interested in entering into Self-Governance must submit certain information as required by the Act. In addition, those tribes and tribal consortia that have entered into Self-Governance funding agreements will be requested to submit certain information as described in 25 CFR 1000. This information will be used to justify a budget request submission on their behalf and to comport with section 405 of the Act that calls for the Secretary to submit an annual report to the Congress. Responses are required to obtain or retain a benefit or are voluntary, depending upon the part of the program being addressed.

Type of Review: Extension without change of currently approved collection.

Respondents: Federally recognized Indian tribes and tribal consortia participating or wishing to enter into Tribal Self-Governance.

Number of Respondents: 85.

Number of Responses: 94.

Estimated Time per Response: Completion times vary from 15 minutes to 400 hours, with an average of approximately 55 hours.

Frequency of Response: On occasion or annually.

Estimated Total Annual Hour Burden: 4,662 hours.

Estimated Total Annual Cost Burden: $10,500 is the estimated total annual cost burden for tribes and tribal consortia first entering the Self-Governance program; this includes capital and start-up costs to obtain equipment and materials necessary to assume the program and activities for which they are entering the Self-Governance program.

Dated: November 21, 2012.

John T. Ashley,

Acting Assistant Director for Information Resources.

[FR Doc. 2012–28805 Filed 11–27–12; 8:45 am]

BILLING CODE 4310–W8–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–490 and 731–TA–1204 (Preliminary)]

Hardwood Plywood From China

Determinations

On the basis of the record [1] developed in the subject investigations, the United States International Trade Commission (Commission) determines, pursuant to sections 703(a) and 733(a) of the Tariff Act of 1930 (19 U.S.C. 1671b(a) and 1673b(a)) (the Act), that there is a reasonable indication that a U.S. industry is materially injured by reason of imports of hardwood plywood from China that are allegedly subsidized and sold in the United States at less than fair value, provided for in subheadings 4412.10, 4412.31, 4412.32, 4412.39, 4412.94, and 4412.99 of the Harmonized Tariff Schedule of the United States.

Pursuant to section 207.18 of the Commission's rules, the Commission also gives notice of the commencement of the final phase of its investigations. The Commission will issue a final phase notice of scheduling, which will be published in the **Federal Register** as provided in section 207.21 of the Commission's rules, upon notice from the Department of Commerce (Commerce) of an affirmative preliminary determination in the investigations under sections 703(b) or 733(b) of the Act, or, if the preliminary determinations are negative, upon notice of an affirmative final determination in those investigations under sections 705(a) or 735(a) of the Act. Parties that filed entries of appearance in the preliminary phase of the investigations need not enter a separate appearance for the final phase of the investigations. Industrial users, and, if the merchandise under investigation is sold at the retail level, representative consumer organizations have the right to appear as parties in Commission antidumping and countervailing duty investigations. The Secretary will prepare a public service list containing the names and addresses of all persons, or their representatives, who are parties to the investigations.

Background

On September 27, 2012, a petition was filed with the Commission and Commerce by Columbia Forest Products, Greensboro, NC; Commonwealth Plywood Co., Ltd., Whitehall, NY; Murphy Plywood, Eugene, OR; Roseburg Forest Products Co., Roseburg, OR; States Industries LLC, Eugene, OR; and Timber Products Company, Springfield, OR combined as *The Coalition for Fair Trade of Hardwood Plywood,* alleging that an industry in the United States is materially injured by reason of LTFV and subsidized imports of hardwood plywood from China. Accordingly, effective September 27, 2012, the Commission instituted countervailing duty investigation No. 701–TA–490 and antidumping duty investigation No. 731–TA–1204 (Preliminary).

Notice of the institution of the Commission's investigations and of a public conference to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** of October 3, 2012 (77 FR 60460). The conference was held in Washington, DC, on October 18, 2012, and all persons who requested the opportunity were permitted to appear in person or by counsel.

The Commission transmitted its determinations in these investigations to the Secretary of Commerce on November 13, 2012. The views of the Commission are contained in USITC Publication 4361 (November 2012), entitled *Hardwood Plywood from China: Investigation Nos. 701–TA–490 and 731–TA–1204 (Preliminary*).

By order of the Commission.

Issued: November 23, 2012.

Lisa R. Barton,

Acting Secretary to the Commission.

[FR Doc. 2012–28818 Filed 11–27–12; 8:45 am]

BILLING CODE 7020–02–P

[1] The record is defined in sec. 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR § 207.2(f)).

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed Consent Decree Under the Comprehensive Environmental Response, Compensation, and Liability Act

On November 21, 2012, the Department of Justice lodged a proposed Consent Decree with the United States District Court for the District of Massachusetts, Eastern Division, in the lawsuit entitled *United States* v. *Brown Shoe Company, Inc. and Brown Group Retail, Inc.* Civil Action No. 1:12–cv–12177–NMG.

The Consent Decree resolves the United States' claims for reimbursement of response costs against Brown Shoe Company, Inc., and Brown Group Retail, Inc. associated with the Whitman Cistern Site in Whitman, Massachusetts pursuant to section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended, 42 U.S.C. 9607(a) (''CERCLA''). Brown Shoe Company, Inc., and Brown Group Retail, Inc. agree to pay $450,000 of the United States' response costs. In return, the United States agrees not to sue the defendants for past response costs under section 107 of CERCLA.

The publication of this notice opens a period for public comment on the Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and should refer to *United States* v. *Brown Shoe Company Inc. and Brown Group Retail, Inc.* D.J. Ref. No. 90–11–3–09664. All comments must be submitted no later than thirty (30) days after the publication date of this notice. Comments may be submitted by either email or mail:

To submit comments:	*Send them to:*
By email	*pubcomment-ees.enrd@usdoj.gov*
By mail	Assistant Attorney General, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

During the public comment period, the Consent Decree may be examined and downloaded for free at the following Department of Justice Web site: *http://www.usdoj.gov/enrd/Consent_Decrees.html.* We will provide a paper copy of the Consent Decree upon written request and payment of reproduction costs. Please mail your request and payment to: Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611.

Please enclose a check or money order for $4.50 (25 cents per page reproduction cost) payable to the United States Treasury.

Ronald Gluck,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2012–28777 Filed 11–27–12; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Office of Juvenile Justice and Delinquency Prevention

[OMB Number 1121–0224]

Agency Information Collection Activities; Extension of a Currently Approved Collection; Comment Request: National Youth Gang Survey

AGENCY: Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, Department of Justice.

ACTION: 30-Day notice.

The U.S. Department of Justice (DOJ), Office of Justice Programs (OJP) will be submitting submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection request is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register**, Volume 77, Number 180, page 57154, on September 17, 2012, allowing for a 60-day comment period.

The purpose of this notice is to allow for an additional 30 days for public comment until December 28, 2012. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Department of Justice Desk Officer, 725 17th Street NW., Washington, DC 20503. Additionally, comments may be submitted to OMB via facsimile to (202) 395–3888. Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility.
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology; e.g., permitting electronic submission of responses.

Overview of This Information Collection

1. *Type of Information Collection:* Extension of a currently approved collection.

2. *Title of the Form/Collection:* National Youth Gang Survey.

3. *Agency form number, if any, and the applicable component of the department sponsoring the collection:* The Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, United States Department of Justice, is sponsoring the collection.

4. *Affected public who will be asked or required to respond, as well as a brief abstract:*

Primary: Local, state, or tribal law enforcement agencies.

Other: None.

Abstract: This collection will gather information related to youth and their activities for research and assessment purposes.

5. *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply:* It is estimated that it will take 2,100 respondents approximately ten minutes each to complete the survey.

6. *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual burden hours to complete the certification form are fewer than 425 hours.

If additional information is required, contact Jerri Murray, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, 145 N Street NE., Room 3W–1407B, Washington, DC 20530

Dated: November 15, 2012.

Jerri Murray,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2012–28183 Filed 11–27–12; 8:45 am]

BILLING CODE 4410–18–P

MARINE MAMMAL COMMISSION

Sunshine Act Meeting Notice

TIME AND DATE: The Marine Mammal Commission will meet in open session on Friday, 14 December 2012, from 12:30 p.m. to 6:00 p.m.

PLACE: The National Marine Fisheries Service's main conference room (Room 445), Juneau Federal Building, 709 West 9th Street, Juneau, Alaska, 99802, telephone (907) 586–7221.

STATUS: The Commission expects that all portions of the meeting will be open to the public. It will allow public participation as time permits and as determined to be desirable by the Chairman. Should it be determined that it is appropriate to close a portion of the meeting to the public, any such closure will be carried out in accordance with applicable regulations (50 CFR § 560.5 and 560.6).

Seating for members of the public may be limited. The Commission therefore asks that those intending to attend the meeting advise it in advance by sending an email to the Commission at *mmc@mmc.gov* or by calling (301) 504–0087. Members of the public will need to present valid, government-issued photo identification to enter the building.

MATTERS TO BE CONSIDERED: The Commission plans to meet with regional management and scientific officials in each of the National Marine Fisheries Service's six regions to identify the most pressing marine mammal research and management needs. The Commission will use these meetings to develop a set of national priorities for guiding federal conservation efforts for marine mammals. Members of the public are invited to attend these meetings and to provide comments concerning priority issues. Those unable to attend any of the meetings may submit comments in writing. Written comments should be sent to Timothy J. Ragen, Executive Director, Marine Mammal Commission, 4340 East-West Highway, Room 700, Bethesda, Maryland 20814.

The Commission already has met with officials in from the National Marine Fisheries Service's Northeast Region. The second meeting will be held in the National Marine Fisheries Service's Alaska Region at the regional headquarters in Juneau, Alaska. Notices of other meetings will be published in the **Federal Register** and posted on the Commission's Web site (*http://www.mmc.gov*) when the dates and locations are determined.

CONTACT PERSON FOR MORE INFORMATION: Timothy J. Ragen, Executive Director, Marine Mammal Commission, 4340 East-West Highway, Room 700, Bethesda, MD 20814; (301) 504–0087; email: *tragen@mmc.gov*.

Dated: November 26, 2012.

Michael L. Gosliner,

General Counsel.

[FR Doc. 2012–28901 Filed 11–26–12; 4:15 pm]

BILLING CODE 6820–31–P

MARINE MAMMAL COMMISSION

Sunshine Act Meeting Notice

TIME AND DATE: The Marine Mammal Commission will meet in open session on Monday, Tuesday, and Wednesday, 10–12 December 2012, from 9:00 p.m. to 5:00 p.m.

PLACE: The Anchorage Marriott Downtown, 820 West 7th Avenue, Anchorage, Alaska, 99501, telephone (907) 279–8000.

STATUS: The Commission expects that all portions of the meeting will be open to the public. It will allow public participation as time permits and as determined to be desirable by the Chairman. Should it be determined that it is appropriate to close a portion of the meeting to the public, any such closure will be carried out in accordance with applicable regulations (50 CFR § 560.5 and 560.6).

Seating for members of the public may be limited. The Commission therefore asks that those intending to attend the meeting advise it in advance by sending an email to the Commission at *mmc@mmc.gov* or by calling (301) 504–0087.

MATTERS TO BE CONSIDERED: The Commission plans to meet with representatives of other federal agencies, Alaska Native organizations, the Environmental Law Institute, and other interested parties to review and seek ways to improve consultations between federal agencies and Alaska Native Tribes. The focus will be on the consultation process and will include, but not be limited to, matters involving marine mammals. In the course of the meeting, the Commission expects to discuss issues related to the authorities for Alaska Native consultations, the role of the Indigenous People's Council for Marine Mammals (IPCoMM) in consultations, the relationship between consultation and co-management, and lessons learned from conflict avoidance agreements. The meeting agenda will be posted on the Commission's Web site (*http://www.mmc.gov*) when it has been finalized.

CONTACT PERSON FOR MORE INFORMATION: Timothy J. Ragen, Executive Director, Marine Mammal Commission, 4340 East-West Highway, Room 700, Bethesda, MD 20814; (301) 504–0087; email: *tragen@mmc.gov*.

Dated: November 26, 2012.

Timothy J. Ragen,

Executive Director.

[FR Doc. 2012–28905 Filed 11–26–12; 4:15 pm]

BILLING CODE 6820–31–P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Advisory Committee on the Records of Congress; Meeting

AGENCY: National Archives and Records Administration.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, the National Archives and Records Administration (NARA) announces a meeting of the Advisory Committee on the Records of Congress. The committee advises NARA on the full range of programs, policies, and plans for the Center for Legislative Archives in the Office of Records Services.

DATES: The meeting will be held on December 10, 2012 from 10:00 a.m. to 11:30 a.m.

ADDRESSES: Capitol Visitor Center, SVC 212–10.

FOR FURTHER INFORMATION CONTACT: Richard H. Hunt, Director; Center for Legislative Archives; (202) 357–5350.

SUPPLEMENTARY INFORMATION:

Agenda

(1) Chair's opening remarks—Secretary of the Senate

(2) Recognition of Co-chair—Clerk of the House

(3) Recognition of the Archivist of the United States

(4) Approval of the minutes of the last meeting

(5) Discussion of on-going projects and activities

(6) Discussion of the Fifth Report

(7) Annual Report of the Center for Legislative Archives

(8) Other current issues and new business

The meeting is open to the public.

Dated: November 20, 2012.

Patrice Murray,

Acting Committee Management Officer.

[FR Doc. 2012–28853 Filed 11–27–12; 8:45 am]

BILLING CODE 7515–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2012–0209]

Japan Lessons-Learned Project Directorate Interim Staff Guidance JLD–ISG–2012–04; Guidance on Performing a Seismic Margin Assessment in Response to the March 2012 Request for Information Letter

AGENCY: Nuclear Regulatory Commission.

ACTION: Japan Lessons-Learned Project Directorate Interim Staff Guidance issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is issuing the Final Japan Lessons-Learned Project Directorate (JLD) Interim Staff Guidance (ISG), JLD–ISG–2012–04, ''Guidance on Performing a Seismic Margin Assessment in Response to the March 2012 Request for Information Letter,'' (Agencywide Documents Access and Management System (ADAMS) Accession No. ML12286A029). This JLD–ISG provides guidance and clarification to assist nuclear power reactor licensees when responding to the NRC staff's request for information dated March 12, 2012, Enclosure 1, ''Recommendation 2.1: Seismic'' (ADAMS Accession No. ML12053A340).

ADDRESSES: You may access information and comment submissions related to this document, which the NRC possesses and are publically available, by searching on *http://www.regulations.gov* under Docket ID NRC–2012–0209.

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2012–0209. Address questions about NRC dockets to Carol Gallagher; telephone: 301–492–3668; email: *Carol.Gallagher@nrc.gov.*
- *NRC's ADAMS:* You may access publicly-available documents online in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''*ADAMS Public Documents''* and then select ''*Begin Web-based ADAMS Search.''* For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The JLD–ISG–2012–04 is available under ADAMS Accession No. ML12286A029.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852.
- *NRC's Interim Staff Guidance Web Site:* Go to *http://www.nrc.gov/reading-*

rm/doc-collections/isg/japan-lessons-learned.html and refer to JLD–ISG–2012–04.

FOR FURTHER INFORMATION CONTACT: Mrs. Lisa M. Regner, Japan Lessons-Learned Project Directorate, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–1906; email: *Lisa.Regner@nrc.gov.*

SUPPLEMENTARY INFORMATION:

Background Information

JLD–ISG–2012–04 is being issued to describe to the public the guidance that is acceptable to the NRC staff for responding to the request to reevaluate seismic hazards at operating reactor sites, as discussed in Enclosure 1, ''Recommendation 2.1: Seismic,'' of the NRC staff's request for information (RFI), ''Request for Information Pursuant to Title 10 of the *Code of Federal Regulations* 50.54(f) Regarding Recommendations 2.1, 2.3, and 9.3, of the Near-Term Task Force Review of Insights from the Fukushima Dai-ichi Accident,'' dated March 12, 2012 (ADAMS Accession No. ML12053A340).

The NRC issued the RFI following the NRC staff's evaluation of the earthquake and tsunami, and resulting nuclear accident, at the Fukushima Dai-ichi nuclear power plant in March 2011. Enclosure 1 to the RFI states that if a seismic margins analysis (SMA) is performed at a plant, then the SMA approach that the licensee uses should be in accordance with the NRC-approved approach in NUREG/CR–4334, ''An Approach to the Quantification of Seismic Margins in Nuclear Power Plants,'' issued in August 1985 (ADAMS Accession No. ML090500182), as enhanced for full-scope plants by NUREG–1407, ''Procedural and Submittal Guidance for the Individual Plant Examination of External Events (IPEEE) for Severe Accident Vulnerabilities.'' This ISG describes the enhancements to the NRC SMA method that are needed to meet the objectives of the RFI letter. In addition, the ISG presents staff positions on the major elements of the NRC SMA. Finally, the ISG provides updated references to allow use of the more recent advances in methods and guidance.

Numerous public meetings were held to receive stakeholder input on the proposed SMA guidance document prior to its issuance formally for public comment. On September 10, 2012 (77 FR 55510), the NRC requested public comments on draft JLD–ISG–2012–04. The staff received seventeen (17) comments from two (2) stakeholders. The comments were considered, evaluated, and resulted in modifications to the final JLD–ISG–2012–04. The comments and staff responses are contained in ''NRC Responses to Public Comments,'' for JLD–ISG–2012–04, which can be found in ADAMS at Accession No. ML12290A002.

Backfitting and Issue Finality

This ISG does not constitute backfitting as defined in 10 CFR 50.109 (the Backfit Rule) and is not otherwise inconsistent with the issue finality provisions in Part 52, ''Licenses, Certifications, and Approvals for Nuclear Power Plants,'' of 10 CFR. This ISG provides guidance on an acceptable method for implementing the March 12, 2012, RFI. Applicants and licensees may voluntarily use the guidance in JLD–ISG–2012–04 to comply with the RFI. Methods, analyses, or solutions that differ from those described in this ISG may be deemed acceptable if they provide sufficient basis and information for the NRC staff to verify that the proposed alternative is acceptable.

Congressional Review Act

This interim staff guidance is a rule as designated in the Congressional Review Act (5 U.S.C. 801–808). OMB has found that this is not a major rule in accordance with the Congressional Review Act.

Dated at Rockville, Maryland, this 16th day of November 2012.

For the Nuclear Regulatory Commission.

Robert M. Taylor,

Deputy Director, Japan Lessons-Learned Project Directorate, Office of Nuclear Reactor Regulation.

[FR Doc. 2012–28755 Filed 11–27–12; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68280; File No. SR–NYSEArca–2012–127]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending its Schedule of Fees and Charges for Exchange Services to Revise Certain Aspects of the Listing Fees Applicable to Structured Products

November 21, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that, on November 13, 2012, NYSE Arca, Inc. (''Exchange'' or ''NYSE Arca'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its Schedule of Fees and Charges for Exchange Services (''Fee Schedule'') to revise certain aspects of the Listing Fees applicable to Structured Products listed on NYSE Arca, LLC (''NYSE Arca Marketplace''), the equities facility of NYSE Arca Equities. The text of the proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, on the Commission's Web site, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its Fee Schedule to revise certain aspects of the Listing Fees applicable to Structured Products listed on the NYSE Arca Marketplace pursuant to NYSE Arca Equities Rule 5.2(j)(1) (Other Securities); NYSE Arca Equities Rule 5.2(j)(2) (Equity Linked Notes); NYSE Arca Equities Rule 5.2(j)(4) (Index-Linked Exchangeable Notes); NYSE Arca Equities Rule 5.2(j)(6) (Equity Index-Linked Securities, Commodity-Linked Securities, Currency-Linked Securities, Fixed Income Index-Linked Securities, Futures-Linked Securities, and

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

Multifactor Indexed-Linked Securities); NYSE Arca Equities Rule 5.2(j)(7) (Trust Certificates); NYSE Arca Equities Rule 8.3 (Currency and Index Warrants); and NYSE Arca Equities Rule 8.400 (Paired Trust Shares). Specifically, the Exchange proposes to remove a provision in the Fee Schedule that provides for the assessment of a fee for subsequent listing of additional shares of Structured Products that are already listed on the Exchange.

Under the current Fee Schedule, a Listing Fee is assessed when an issuer initially lists a Structured Product. Additionally, fees are assessed if an issuer subsequently lists additional shares of the same Structured Product. The Listing Fees for Structured Products are as follows:

Shares outstanding	Fee
Up to 1 million	$5,000
1+ to 2 million	10,000
2+ to 3 million	15,000
3+ to 4 million	20,000
4+ to 5 million	25,000
5+ to 6 million	30,000
6+ to 7 million	30,000
7+ to 8 million	30,000
8+ to 9 million	30,000
9+ to 10 million	32,500
10+ to 15 million	37,500
in excess of 15 million	45,000

Effective January 1, 2013, the Exchange proposes to eliminate the current fee for subsequent listings of additional shares of Structured Products that are already listed on the Exchange and, accordingly, were assessed a fee upon initial listing. As a result, the Structured Product Listing Fees would apply when an issuer initially lists a series of a Structured Product and, therefore, would not apply to subsequent listings of additional shares of such listed products. In this regard, and as is currently the case, the Exchange treats each series of a Structured Product as a separate issue for which fees are charged, as provided above.

The Exchange notes that the proposed changes are not otherwise intended to address any other issues surrounding Structured Products or Listing Fees associated therewith and that the Exchange is not aware of any problems that issuers would have in complying with the proposed change.

The Exchange proposes to implement the fee changes on January 1, 2013. In this regard, the changes proposed in the Exhibit 5 attached hereto [3] describe the manner in which the fees shall continue to apply through December 31, 2012 as well as the manner in which fees shall apply effective January 1, 2013.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[4] in general, and furthers the objectives of Section 6(b)(4) of the Act,[5] in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers, and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers, or dealers.

Specifically, the Exchange believes that the proposed change is reasonable because it would eliminate the current fee for subsequent listings of additional shares of Structured Products that are already listed on the Exchange and, accordingly, are assessed a fee upon initial listing. Accordingly, eliminating the fee is reasonable because it would result in subsequent listings of additional shares of a product that is already listed on the Exchange being more affordable for all issuers of Structured Products. In this regard, the Exchange also believes that the proposed change is reasonable because eliminating such fees is consistent with the Exchange's Listing Fees for derivative securities products, such as exchange-traded funds (''ETFs''), which are not charged an additional fee for subsequent listings of additional shares of the same product.

The Exchange believes that the proposed change is equitable and not unfairly discriminatory because it would apply equally to all issuers of Structured Products listed on the Exchange. The Exchange also believes that the proposed change is equitable and not unfairly discriminatory because it would align the fee structure applicable to Structured Products with that of derivative securities products, like ETFs, that are listed on the Exchange. In this regard, the Exchange believes that derivative securities products and Structured Products share certain characteristics, such that, in the Exchange's opinion, they should also be treated the same with respect to the method of billing for listing subsequent shares of the same product that is already listed on the Exchange.

Finally, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues. In such an environment, the Exchange must continually review, and consider adjusting, its fees and credits to remain competitive with other exchanges. For the reasons described above, the Exchange believes that the proposed rule change reflects this competitive environment.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A) of the Act [6] and subparagraph (f)(2) of Rule 19b-4 [7] thereunder, because it establishes a due, fee, or other charge imposed by NYSE Arca.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–NYSEArca–2012–127 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

[3] The Commission notes that Exhibit 5 is attached to the filing, not to this Notice.

[4] 15 U.S.C. 78f(b).

[5] 15 U.S.C. 78f(b)(4).

[6] 15 U.S.C. 78s(b)(3)(A).

[7] 17 CFR 240.19b–4(f)(2).

All submissions should refer to File Number SR–NYSEArca–2012–127. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Section, 100 F Street NE., Washington, DC 20549–1090 on official business days between 10:00 a.m. and 3:00 p.m. Copies of the filing will also be available for inspection and copying at the New York Stock Exchange's principal office and on its Internet Web site at *www.nyse.com*. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2012–127 and should be submitted on or before December 19, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[8]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–28796 Filed 11–27–12; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68281; File No. SR–NSX–2012–23]

Self-Regulatory Organizations; National Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Clarify the Operation of the Exchange's Depth-of-Book Feed

November 21, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 15, 2012, National Stock Exchange, Inc. (''NSX®'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change, as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comment on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The Exchange is proposing to clarify the manner in which it distributes the NSX depth-of-book feed (''DOB feed'') to authorized recipients. The text of the proposed rule change is available on the Exchange's Web site at *http://www.nsx.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

On December 15, 2011, the Exchange filed a proposed rule change with the Commission outlining the manner in which the Exchange distributes the NSX DOB feed to authorized recipients.[3] The Exchange is proposing to clarify a statement contained in SR–NSX–2011–15, which stated that ''[t]he DOB feed does not disclose the source of any order or identify any transaction party.'' This statement failed to disclose that an ETP Holder can request that their quotations be attributed to them in the NSX DOB feed (''quote attribution''). The Exchange now submits this proposed rule change to clarify that an ETP Holder may affirmatively request quote attribution. Absent such a request, the ETP Holder's quotations are not attributed.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6(b) of the Securities and Exchange Act of 1934 (the ''Act''),[4] in general, and Section 6(b)(5) of the Act,[5] in particular, in that it is designed to promote just and equitable principles of trade, remove impediments to, and perfect the mechanism of, a free and open market and a national market system, and, in general, protect investors and the public interest. Informing an ETP Holder that it may affirmatively request quote attribution enhances market transparency and promotes competition. The Exchange also believes that the proposed change is consistent with Section 6(b)(5) of the Act,[6] which also requires, among other things, that the Exchange's rules are not designed to unfairly discriminate between customers, issuers, brokers or dealers because all qualified ETP Holders, and other qualified recipients, are eligible to receive the DOB Feed and all ETP Holders can request quote attribution.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments on the proposed rule change were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has

[8] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 66007 (December 20, 2011) 76 FR 81000 (December 27, 2011) (SR–NSX–2011–15). Since March 2012, the Exchange has charged authorized recipients for the NSX DOB Feed. *See* Securities Exchange Act Release No. 66511 (March 5, 2012) 77 FR 14450 (March 9, 2012) (SR–NSX–2012–04).

[4] 15 U.S.C. 78f(b).

[5] 15 U.S.C. 78f(b)(5).

[6] 15 U.S.C. 78f(b)(5).

become effective pursuant to Section 19(b)(3)(A) of the Act[7] and subparagraph (f)(6) of Rule 19b–4 thereunder.[8]

A proposed rule change filed under Rule 19b–4(f)(6)[9] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[10] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposed rule change may be implemented upon filing with the Commission. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest as it will provide immediate clarification that ETP Holders may affirmatively request that quotations be attributed to them, and that absent such a request, the identity of ETP Holders will not be divulged.[11] Therefore, the Commission hereby waives the 30-day operative delay and designates the proposed rule change to be operative upon filing with the Commission.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NSX–2012–23 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NSX–2012–23. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal offices of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NSX–2012–23, and should be submitted on or before December 19, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Kevin M. O'Neill,

Deputy Secretary.

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[7] 15 U.S.C. 78s(b)(3)(A).

[8] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of the filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[9] 17 CFR 240.19b–4(f)(6).

[10] 17 CFR 240.19b–4(f)(6)(iii).

[11] For purposes only of waiving the operative delay for this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68282; File No. SR–NYSE–2012–63]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending NYSE Rule 123C(9)(a)(1)(ii) To Delete the Requirement That the Order Acceptance Cut-Off Time Cannot Be Past 4:30 p.m.

November 21, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that November 8, 2012, New York Stock Exchange LLC (''NYSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend NYSE Rule 123C(9)(a)(1)(ii) to delete the requirement that the order acceptance cut-off time cannot be past 4:30 p.m. The text of the proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Rule 123C(9)(a)(1)(ii) to delete the requirement that the order acceptance cut-off time cannot be past 4:30 p.m. (or 30 minutes after the scheduled close in the case of an earlier close).[3]

Background

Pursuant to Rule 123C(9)(a)(1), the Exchange may suspend Rule 52 (Hours of Operation) to resolve an extreme order imbalance that may result in a price dislocation at the close as a result of an order entered into Exchange systems, or represented to a Designated Market Maker (''DMM'') orally at or near the close. Rule 123C(9)(a)(1) was intended to be and has been invoked to attract offsetting interest in rare circumstances where there exists an extreme imbalance at the close such that a DMM is unable to close the security without significantly dislocating the price.

Pursuant to Rule 123C(9)(a)(1)(ii), once it has been determined to suspend Rule 52 and solicit offsetting interest, the Exchange is responsible for soliciting such offsetting interest from both on-Floor and off-Floor participants. Such solicitation requests include, at a minimum, the security symbol, the imbalance amount and side, the last sale price, and an order acceptance cut-off time. The Exchange designates the order acceptance cut-off time, but the Rule currently provides that in no event shall the order acceptance cut-off time be later than 4:30 p.m. (or 30 minutes after the scheduled close in the case of an earlier close).

Currently, the Exchange uses Trader Updates to solicit interest from off-Floor participants. The Exchange's Trader Updates are posted on the Exchange's Web site and are distributed both by RSS feed and by email to anyone who subscribes to receive such free updates.

Since January 3, 2011, when the Rule, which was previously operated on a pilot bases, became a permanent rule, the Exchange and NYSE MKT LLC (''NYSE MKT''), which has an identical rule for its equity market, have invoked the relief available pursuant to the Rule only once, on September 21, 2012. In 2010, Rule 123C(9)(a)(1) was invoked only three times on both markets.

Proposed Amendment

The Exchange proposes to amend Rule 123C(9)(a)(1)(ii) to delete the requirement that the order acceptance cut-off time shall be no later than 4:30 p.m., or in the case of an early scheduled close, 30 minutes after the closing time. The Exchange believes it is appropriate to delete the bright-line cut off time because it hinders the ability of the Exchange to ensure a fair and orderly close if adhering to the 4:30 p.m. order acceptance cut-off time is not possible under the particular circumstances.

In particular, the Exchange notes that for two of the four times that the rule has been invoked since 2010, the Exchange has extended the order acceptance cut-off time past 4:30 p.m. The reasons for the extensions differed, but the Exchange believes that given the rarity of the need to invoke the provisions of Rule 123C(9)(a)(1) in the first instance, together with what the Exchange has experienced in those few events, it is appropriate to delete the bright-line 4:30 p.m. cut-off time.

For example, on February 12, 2010, due to corporate actions in Berkshire Hathaway (BRK) Class A and B securities, there was significant trading volume in those securities, including at the close. In the circumstances, it was determined that the most efficient manner to effect the close of trading in those securities was to effect the closing transaction in BRK–B before closing the BRK–A shares. After closing the BRK–B security at 4:19 p.m., the DMM assessed the shares eligible to be executed for the BRK–A close and determined that the imbalance was significant enough to invoke the procedures of Rule 123C(9)(a)(1). Due to the complexity of the situation, the Exchange was not able to issue its solicitation of offsetting interest until 4:27 p.m. Because three minutes was not sufficient time to receive incoming offsetting interest and close the security, the Exchange accepted order flow past the 4:30 p.m. order acceptance cut-off time. The Exchange filed with the Commission a rule proposal that permitted the temporary suspension of the Rule 123C(9)(a)(1)(ii) 4:30 p.m. order acceptance cut-off time.[4]

More recently, on Friday, September 21, 2012, there was a buy imbalance in Weatherford International LTD (WFT) that could not be satisfied by sell orders on the Book. Accordingly, the Exchange invoked procedures pursuant to Rule 123C(9) to solicit interest from both off-Floor and on-Floor participants to offset that imbalance. While the Exchange initiated publication of solicitation for such offsetting interest immediately following 4:00 p.m., due to delays in the Exchange's web and email systems, the Exchange's two solicitations of interest, which were sent at 4:22 p.m. and 4:28 p.m., did not leave Exchange systems until 4:29 p.m. and 4:35 p.m., respectively, and were time-stamped accordingly. Because of these delays, the Exchange extended the order acceptance cut-off time to 4:35 p.m., which is past the time prescribed in Rule 123C(9)(a)(1)(ii). By extending the order acceptance cut-off time to 4:35 p.m., the Exchange was able to attract sufficient sell-side interest to offset the buy imbalance and the stock was closed shortly thereafter on a transaction of 7.822 million shares, unchanged from the last sale price of $13.54.[5]

Although the Exchange did not have rule authority to extend the order acceptance cut-off time in the WFT closing situation to 4:35 p.m., the Exchange believes that it acted appropriately under the circumstances to ensure that WFT could close in a fair and orderly manner at a price that was not significantly dislocated from the last sale price. In particular, the issue that the Exchange experienced with respect to its web and email system was unanticipated and the Exchange sought to respond in a manner that protected investors and the public interest by ensuring a fair and orderly close.

The Exchange believes it is appropriate to provide the Exchange with authority to designate an order acceptance cut-off time that is tailored to the particular situation, rather than have to adhere to the 4:30 p.m. time frame. The Exchange's ultimate goal is to ensure a fair and orderly close in a manner that is as close to the official 4:00 p.m. closing time as possible. However, depending on the circumstances, whether because of the complexity of the closing process for a particular security or because of a system or technology issue, requiring a bright-line order acceptance time may not be appropriate.

Moreover, the Exchange believes that adhering to such a bright-line cut-off time could harm investors and the public. For example, in both the BRK–A and WFT closes, if the Exchange had adhered to the 4:30 p.m. cut-off time, the Exchange would not have been able to complete its solicitation of offsetting

[3] The Exchange notes that parallel changes are proposed to be made to the rules of NYSE MKT LLC. *See* SR–NYSEMKT–2012–65.

[4] *See* Securities Exchange Act Release No. 61549 (Feb. 19, 2010), 75 FR 9009 (Feb. 26, 2010) (SR–NYSE–2010–09).

[5] On September 27, 2012, the Exchange published a Trader Update that provided the public with notice of this issue: *http://traderupdates.nyse.com/2012/09/weatherford_international_ltd.html.*

interest. Without such offsetting interest, the Exchange had two alternatives, either close the stock at a price significantly dislocated from the last sale price, or invoke an order imbalance halt and not hold a closing transaction. The Exchange does not believe that either alternative is in the best interest of investors or the public. Rather, the Exchange believes that ensuring that the closing price is not significantly dislocated from the last sale, even if that means a delayed closing time, would benefit investors and the public.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b)[6] of the Securities Exchange Act of 1934 (the ''Act''), in general, and furthers the objectives of Section 6(b)(5),[7] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest, and it is not designed to permit unfair discrimination among customers, brokers, or dealers.

In particular, the Exchange believes that providing the Exchange with the authority to designate the order cut-off time as appropriately tailored to the particular situation removes impediments to and perfects the mechanism of a free and open market because it enables the Exchange to complete the process to solicit interest to offset an imbalance at the close that would otherwise result in a significant price dislocation. Without the relief requested herein, the Exchange may not be able to complete the process to solicit offsetting interest, which would result in either the stock closing at a dislocated price, or require the Exchange to invoke an order imbalance halt in the security. The Exchange believes such solutions could harm investors and the public because of either an unnecessarily dislocated closing price, or in the case of an imbalance halt, orders intended for the closing transaction would not be executed. The Exchange further believes that the proposed rule change would protect investors and the public interest because it would enable the Exchange to complete the process to ensure that the closing price that may be closer to the last sale price, rather than a closing price that is significantly dislocated from the last sale price.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[8] and Rule 19b-4(f)(6) thereunder.[9] Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b-4(f)(6)(iii) thereunder.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSE–2012–63 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSE–2012–63. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2012–63 and should be submitted on or before December 19, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–28798 Filed 11–27–12; 8:45 am]

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[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

[8] 15 U.S.C. 78s(b)(3)(A)(iii).

[9] 17 CFR 240.19b-4(f)(6).

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68283; File No. SR–NYSE–2012–45]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Its Price List To Specify Pricing That Is Currently Applicable to Certain Executions on the Exchange, but That Is Not Currently Included in the Price List

November 21, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that, on November 9, 2012, New York Stock Exchange LLC (the ''Exchange'' or ''NYSE'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its Price List to specify pricing that is currently applicable to certain executions on the Exchange, but that is not currently included in the Price List. The text of the proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange is proposing to amend its Price List to specify pricing that is currently applicable to certain executions on the Exchange, but that is not currently included in the Price List. The Exchange proposes to make the changes immediately effective and operative.

Specifically, the Exchange proposes to include the following changes to the Price List to reflect pricing that is currently being assessed for the following intraday transactions: (1) A $0.0005 fee for a Floor broker discretionary e-Quote (''d-Quote'') that takes liquidity in a security priced $1 or above; (2) no charge (i.e., free) for a non-electronic agency transaction of a Floor broker that executes against the Book, both in a security priced $1 or above and in a security priced below $1; (3) no charge for a non-electronic agency transaction between Floor brokers in the crowd in a security priced below $1; and (4) no charge for an agency cross trade (i.e., a trade where a member organization has customer orders to buy and sell an equivalent amount of the same security) in a security priced below $1.

d-Quotes

The Exchange proposes to specify in the Price List that a d-Quote that removes liquidity from the Book is charged $0.0005 per share if the security is priced $1 or above.[3] A d-Quote that adds liquidity to the Book in a security priced $1 or above will continue to receive a credit of $0.0019 per share.[4] Similarly, a d-Quote that adds liquidity to the Book in a security priced below $1 will continue to receive a credit of $0.0004 per share.[5] Also, a d-Quote that removes liquidity from the Book in a security priced below $1 will continue to be charged a fee equal to 0.3% of the total dollar volume of the transaction.[6]

Non-Electronic Agency Transactions

The Exchange proposes to specify in the Price List that a non-electronic agency transaction of a Floor broker that executes against the Book is not charged (i.e., it is free),[7] both for a security priced $1 or above and for a security priced below $1.[8] This is the same rate (i.e., free) that is currently specified in the Price List for non-electronic agency transactions between Floor brokers in the crowd in securities priced $1 or above. In this regard, the Exchange also proposes to specify in the Price List that there is no charge for a non-electronic agency transaction between Floor brokers in the crowd in a security priced below $1.[9]

Agency Cross Trades

The Price List currently specifies that an agency cross trade is not charged for a security priced $1 or above.[10] Similarly, the Exchange proposes to specify in the Price List that there is no charge for an agency cross trade in a security priced below $1.[11]

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the ''Act''),[12] in general, and furthers the objectives of Section 6(b)(4) of the Act,[13] in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

The Exchange believes that the proposed d-Quote rate of $0.0005 per share for securities priced $1 or above is reasonable because, when compared to the rate that would otherwise apply (i.e., $0.0024 per share for all other Floor broker transactions that take liquidity from the Exchange) it may encourage additional liquidity during

[3] The Exchange has charged for d-Quotes that removed liquidity since October 2007.

[4] This is in accordance with the current Price List and therefore the Exchange is not proposing a new or separate line item therein for this type of transaction.

[5] *Id.*

[6] *Id.*

[7] Because of the nature of non-electronic trading interest (i.e., verbal/manual interest), the concept of adding and removing liquidity is not applicable.

[8] The Exchange began charging for a non-electronic agency transaction of a Floor broker that executed against the Book in October 2007. Beginning in March 2009, the Exchange no longer charged for this type of transaction.

[9] The Exchange has not charged for a non-electronic agency transaction between Floor brokers in the crowd in a security priced below $1 since October 2007, if the transaction was for 10,000 shares or more, and since March 2009, if the transaction was for fewer than 10,000 shares.

[10] Because of the nature of an agency cross trade (i.e., the member organization already has customer orders to buy and sell an equivalent amount of the same security), the concept of adding and removing liquidity is not applicable.

[11] The Exchange has not charged for an agency cross trade in a security priced below $1 since October 2007, if the transaction was for 10,000 shares or more, and since March 2009, if the transaction was for fewer than 10,000 shares.

[12] 15 U.S.C. 78f(b).

[13] 15 U.S.C. 78f(b)(4).

the trading day and may incentivize Floor brokers to provide additional intra-quote price improved trading, which would contribute to the quality of the Exchange's market. The Exchange also believes that the proposed rate of $0.0005 per share is equitable and not unfairly discriminatory because it may provide opportunities for Floor brokers to attract additional liquidity to the Floor and thereby increase the quality of order execution on the Exchange's market, which benefits all market participants.

Additionally, the Exchange believes that not charging for a non-electronic agency transaction of a Floor Broker that executes against the Book, in both securities priced $1 or above as well as securities priced below $1, is reasonable because it would be set at a level that would align the rate with certain other non-electronic agency Floor broker interest that is similarly not charged. In this regard, and as noted above, the Exchange does not charge for executions of non-electronic agency transactions between Floor brokers in the crowd.[14] Additionally, the Exchange believes that this is equitable and not unfairly discriminatory because a non-electronic agency transaction of a Floor broker would be used, for example, at a time of the trading day when a Floor broker is physically present at the point of sale and requires flexibility to represent customer interest, which is unique to a Floor broker, but which may also result in added opportunity cost and uncertainty for the Floor broker when compared to an electronic execution.

The Exchange also believes that it is reasonable to specify that a non-electronic agency transaction between Floor brokers in the crowd is not charged for securities priced below $1 because doing so will add greater specificity to the Price List by reflecting that it is the same as the rate charged for such transactions in securities priced $1 or above. This is also equitable and not unfairly discriminatory because it would provide greater certainty regarding the applicable rates for transactions in securities priced below $1. The Exchange believes that not charging for these transactions is further reasonable because it may incentivize additional liquidity in these low-priced securities, which typically are more thinly-traded and less liquid than securities priced $1 or above. Accordingly, it is also equitable and not unfairly discriminatory to not charge for these transactions because the increased liquidity that may result in these securities would increase the quality of order execution on the Exchange's market, which benefits all market participants. Finally, and as described above for a non-electronic agency transaction of a Floor broker that executes against the Book, the Exchange believes that this is equitable and not unfairly discriminatory because non-electronic agency transactions between Floor brokers in the crowd occur, for example, at a time of the trading day when a Floor broker is physically present at the point of sale and requires flexibility to represent customer interest, which is unique to a Floor broker, but which may also result in added opportunity cost and uncertainty for the Floor broker when compared to an electronic execution.

The Exchange also believes that it is reasonable to specify that an agency cross trade is not charged for securities priced below $1 because doing so will add greater specificity to the Price List by reflecting that it is the same as the rate charged for such transactions in securities priced $1 or above. This is also equitable and not unfairly discriminatory because it would provide greater certainty regarding the applicable rates for transactions in securities priced below $1. The Exchange believes that not charging for these transactions is further reasonable because of the nature of an agency cross trade, in that it is a trade where a member organization has customer orders to buy and sell an equivalent amount of the same security.[15]

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)[16] of the Act and subparagraph (f)(2) of Rule 19b–4[17] thereunder, because it establishes a due, fee, or other charge imposed by the NYSE.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml);* or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSE–2012–45 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSE–2012–45. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal

[14] The Commission notes that the Exchange does not charge for executions of non-electronic agency transactions between Floor brokers in the crowd for transactions in stocks with a per share stock price of $1.00 or more.

[15] *See supra* note 10.

[16] 15 U.S.C. 78s(b)(3)(A).

[17] 17 CFR 240.19b–4(f)(2).

office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2012–45 and should be submitted on or before December 19, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–28799 Filed 11–27–12; 8:45 am]

BILLING CODE 8011–01–P

DEPARTMENT OF STATE

[Public Notice 8098]

Notice of Meeting of Advisory Committee on International Law

A meeting of the Advisory Committee on International Law will take place on Friday December 14, from 9:30 a.m. to approximately 5:30 p.m., at the George Washington University Law School (Frederick Lawrence Student Conference Center), 2000 H St. NW., Washington, DC. The meeting will be chaired by the Legal Adviser of the Department of State, Harold Hongju Koh, and will be open to the public up to the capacity of the meeting room. It is anticipated that the agenda of the meeting will cover a range of current international legal topics, including corporate social responsibility, principles of self-defense, maritime security, international promotion of the freedom of expression, and the International Law Commission's consideration of the topic of crimes against humanity.

Members of the public who wish to attend the session should, by Friday, December 7, 2012, notify the Office of the Legal Adviser (telephone: (202) 776–8442, email: *LermanJB@state.gov mailto:KillTP@state.gov*) of their name, professional affiliation, address, and telephone number. A valid photo ID is required for admittance. A member of the public who needs reasonable accommodation should make his or her request by December 5, 2012. Requests made after that time will be considered but might not be possible to accommodate.

[18] 17 CFR 200.30–3(a)(12).

Dated: November 20, 2012.

Theodore P. Kill,

Attorney-Adviser, Office of Claims and Investment Disputes, Office of the Legal Adviser, Executive Director, Advisory Committee on International Law, Department of State.

[FR Doc. 2012–28851 Filed 11–27–12; 8:45 am]

BILLING CODE 4710–08–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Twelfth Meeting: RTCA Special Committee 223, Airport Surface Wireless Communications

AGENCY: Federal Aviation Administration (FAA), U.S. Department of Transportation (DOT)

ACTION: Meeting Notice of RTCA Special Committee 223, Airport Surface Wireless Communications.

SUMMARY: The FAA is issuing this notice to advise the public of the meeting of the RTCA Special Committee 223, Airport Surface Wireless Communications.

DATES: The meeting will be held December 4–6, 2012, from 9:00 a.m.–5:00 p.m.

ADDRESSES: The meeting will be held at the Boeing, Building 2–25 Lobby, 7755 East Marginal Way South, Seattle, WA 98108.

FOR FURTHER INFORMATION CONTACT: The RTCA Secretariat, 1150 18th Street NW., Suite 910, Washington, DC, 20036, or by telephone at (202) 330–0662/(202) 833–9339, fax (202) 833–9434, or Web site at *http://www.rtca.org.*

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. No. 92–463, 5 U.S.C., App.), notice is hereby given for a meeting of Special Committee 223. The agenda will include the following:

Tuesday, December 4th—Thursday, December 6th, 2012

- Plenary
- Welcome, Introductions, Administrative Remarks by Special Committee Leadership
- Agenda Overview
- Review/Approve prior Plenary Meeting Summary and Action Item Status
- General Presentations of Interest
  - ICAO WG–S Status
  - EUROCAE WG–82 Status
- Detailed MOPS Review
- Establish Agenda, Date and Place for Next Plenary Meetings
- Review of Meeting Summary Report
- Adjourn–Plenary Meeting

Attendance is open to the interested public but limited to space availability. With the approval of the chairman, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. Members of the public may present a written statement to the committee at any time.

Issued in Washington, DC, on November 8, 2012.

Richard F. Gonzalez,

Management Analyst, Business Operations Group, Federal Aviation Administration.

[FR Doc. 2012–28854 Filed 11–27–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2011–0165]

Parts and Accessories Necessary for Safe Operation; Grant of Exemption for Transecurity LLC (Transecurity)

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of final disposition.

SUMMARY: The Federal Motor Carrier Safety Administration (FMCSA) announces its decision to grant an exemption to Transecurity LLC (Transecurity) that will allow the placement of an onboard safety monitoring system (OBMS) at the bottom of windshields on commercial motor vehicles (CMVs). The Federal Motor Carrier Safety Regulations (FMCSRs) currently require antennas, transponders, and similar devices to be located not more than 6 inches below the upper edge of the windshield, outside the area swept by the windshield wipers, and outside the driver's sight lines to the road and highway signs and signals. Transecurity is coordinating the development and installation of camera-based monitoring systems in up to 500 CMVs operating throughout the United States in support of research being conducted on behalf of FMCSA. The exemption would enable motor carriers to participate in a field operation test to evaluate the system and allow for on-road data collection. FMCSA believes that permitting the OBMS to be mounted lower than currently allowed, but still outside the driver's sight lines to the road and highway signs and signals, will maintain a level of safety that is equivalent to, or greater than, the level

of safety achieved without the exemption.

DATES: This exemption is effective from November 28, 2012 until November 28, 2014.

FOR FURTHER INFORMATION CONTACT: Mr. Luke W. Loy, Vehicle and Roadside Operations Division, Office of Bus and Truck Standards and Operations, MC–PSV, at (202) 366–0676 or *luke.loy@dot.gov,* Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue SE., Washington, DC 20590–0001.

SUPPLEMENTARY INFORMATION:

Background

Section 4007 of the Transportation Equity Act for the 21st Century (TEA–21) [Pub. L. 105–178, June 9, 1998, 112 Stat. 107, 401] amended 49 U.S.C. 31315 and 31136(e) to provide authority to grant exemptions from the FMCSRs. A rule implementing section 4007 was published on December 8, 1998 (63 FR 67600). Under this rule, FMCSA must publish a notice of each exemption request in the **Federal Register** (49 FR 381.315(a)). The Agency must provide the public with an opportunity to inspect the information relevant to the application, including any safety analyses that have been conducted. The Agency must also provide an opportunity for public comment on the request.

Transecurity's Application for Exemption

Transecurity applied for an exemption from 49 CFR 393.60(e)(1) to allow the installation of camera-based OBMS in up to 500 CMVs. A copy of the application is included in the docket referenced at the beginning of this notice.

Section 393.60(e)(1) of the FMCSRs prohibits the obstruction of the driver's field of view by devices mounted at the top of the windshield. Antennas, transponders and similar devices (devices) must not be mounted more than 152 mm (6 inches) below the upper edge of the windshield. These devices must be located outside the area swept by the windshield wipers and outside the driver's sight lines to the road and highway signs and signals.

Transecurity has applied for the exemption because it wants to install the camera-based OBMS equipment in up to 500 CMVs operating throughout the United States in support of research being conducted on behalf of the FMCSA Analysis, Research and Technology Division. Transecurity contends that it must be able to mount the camera-based OBMS lower than allowed under 49 CFR 393.60(e)(1) ''because the safety equipment must have a clear forward facing view of the road, and low enough to accurately scan facial features for detection of impaired driving.'' Transecurity's mounting preference for the camera-based OBMS and necessary brackets is at the bottom of the windshield; the best position is within and/or below three inches of the bottom of the driver side windshield wiper sweep, and out of the driver's sightlines to the road and highway signs and signals.

FMCSA Grant of Waiver to Transecurity

Pursuant to 49 U.S.C. 31315(a) and 49 CFR part 381, subpart B, FMCSA granted Transecurity a 90-day waiver on July 23, 2012, to allow the placement of the OBMS at the bottom of windshields on CMVs, outside of the area permitted by 49 CFR 393.60. This waiver was effective from July 24, 2012, through October 23, 2012. Up to 500 OBMS were to be installed on CMVs operated by the motor carriers listed below:

1. DOT #90792; Eagle Transport Corporation-Rocky Mount, NC.
2. DOT #252234; Holiday Tours Inc.-Randleman, NC.
3. DOT #16377; H&W Trucking Co. Inc.-Mt. Airy, NC.
4. DOT #348258; Associated Grocers-Baton Rouge, LA.
5. DOT #2222676; AM Express Inc.-Escanaba, MI.

During the waiver period, these motor carriers participating in the FMCSA research field operation test must ensure that the OBMS is mounted within and/or below three inches of the bottom of the driver side windshield wiper sweep, and out of the driver's sightlines to the road and highway signs and signals as much as practicable.

Comments

On August 23, 2012, FMCSA published notice of the Transecurity application and asked for public comment (77 FR 51104). The Agency received no comments. While FMCSA acknowledges that Transecurity did not present specific studies or data showing that safety will not be degraded, the Agency believes that placement of the OBMS within and/or below three inches of the bottom of the driver side windshield wiper sweep (1) will be outside the drivers' sight lines, and therefore (2) will not have an adverse impact on safety. The FMCSA encourages any party having information that motor carriers utilizing this exemption are not achieving the requisite level of safety immediately to notify the Agency. If safety is being compromised, or if the continuation of the exemption is not consistent with 49 U.S.C. 31315(b) and 31136(e), FMCSA will take immediate steps to revoke the exemption.

Terms and Conditions for the Exemption

Based on its evaluation of the application for an exemption, FMCSA grants Transecurity's request. The Agency believes that the safety performance of motor carriers during the 2-year exemption period will likely achieve a level of safety that is equivalent to, or greater than, the level of safety achieved without the exemption because (1) based on the technical information available, there is no indication that the OBMS would obstruct drivers' views of the roadway, highway signs and surrounding traffic; (2) generally, trucks and buses have an elevated seating position which greatly improves the forward visual field of the driver, and any impairment of available sight lines would be minimal; and (3) the location within and/or below three inches of the bottom of the driver side windshield wiper sweep, and out of the driver's sightline is reasonable and enforceable at roadside. Without the exemption, FMCSA would be unable to test this innovative onboard safety monitoring system. The Agency hereby grants the exemption for a two-year period, beginning October 24, 2012 and ending October 23, 2014.

During the temporary exemption period, up to 500 OBMS will be installed on CMVs operated by the motor carriers listed below:

1. DOT #90792; Eagle Transport Corporation-Rocky Mount, NC.
2. DOT #252234; Holiday Tours Inc.-Randleman, NC.
3. DOT #16377; H&W Trucking Co. Inc.-Mt. Airy, NC.
4. DOT #348258; Associated Grocers-Baton Rouge, LA.
5. DOT#2222676; AM Express Inc.-Escanaba, MI.

These motor carriers must ensure that the OBMS is mounted within and/or below 3 inches of the bottom of the driver side windshield wiper sweep, and out of the driver's sightlines to the road and highway signs and signals.

Preemption

During the period the exemption is in effect, no State shall enforce any law or regulation that conflicts with or is inconsistent with this exemption with respect to a person operating under the exemption.

Issued on: November 21, 2012.

Anne S. Ferro,

Administrator.

[FR Doc. 2012–28823 Filed 11–27–12; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

Petition To Modify an Exemption of a Previously Approved Antitheft Device; Mitsubishi Motors R&D of America

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Grant of petition to modify an exemption of a previously approved antitheft device.

SUMMARY: On February 2, 2009, the National Highway Traffic Safety Administration (NHTSA) granted in full Mitsubishi Motors R&D (Mitsubishi) of America's petition for an exemption in accordance with § 543.9(c)(2) of 49 CFR part 543, *Exemption From the Theft Prevention Standard* for the Mitsubishi Outlander vehicle line beginning with its model year (MY) 2011 vehicles. On August 6, 2012, Mitsubishi submitted a petition to modify its previously approved exemption for the Outlander vehicle line beginning with its model year (MY) 2014 vehicles. Mitsubishi also requested confidential treatment of specific information in its petition. The agency will address Mitsubishi's request for confidential treatment by separate letter. NHTSA is granting Mitsubishi's petition to modify the exemption in full because it has determined that the modified device is also likely to be as effective in reducing and deterring motor vehicle theft as compliance with the parts-marking requirements of the Theft Prevention Standard.

DATES: The modification granted by this notice is effective beginning with the 2014 model year (MY).

FOR FURTHER INFORMATION CONTACT: Ms. Deborah Mazyck, Office of International Policy, Fuel Economy and Consumer Programs, NHTSA, 1200 New Jersey Avenue SE., Washington, DC 20590. Ms. Mazyck's telephone number is (202) 366–4139. Her fax number is (202) 493–2990.

SUPPLEMENTARY INFORMATION: On February 2, 2009, NHTSA published in the **Federal Register** a notice granting in full a petition from Mitsubishi for an exemption from the parts-marking requirements of the Theft Prevention Standard (49 CFR 541) for the Outlander vehicle line beginning with its MY 2011 vehicles (see 74 FR 5891, February 2, 2009). The Mitsubishi Outlander is currently equipped with a passive, transponder-based, electronic engine immobilizer device and an audible and visible alarm.

On August 6, 2012, Mitsubishi submitted a petition to modify the previously approved exemption for the Outlander vehicle line. This notice grants in full Mitsubishi's petition to modify the exemption for the Outlander vehicle line beginning with its MY 2014 vehicles. Mitsubishi's submission is a complete petition, as required by 49 CFR part 543.9(d), in that it meets the general requirements contained in 49 CFR Part 543.5 and the specific content requirements of 49 CFR part 543.6. Mitsubishi's petition for modification provides a detailed description and diagram of the identity, design, and location of the components of the antitheft device proposed for installation beginning with the 2014 model year.

The current antitheft device installed on the Mitsubishi Outlander included an electronic key, electronic control unit (ECU), and a passive immobilizer. Mitsubishi stated that entry models for the Outlander vehicle line are equipped with an immobilizer that functions via a Wireless Control Module (WCM). The features of the WCM include a transponder key, key ring antenna, Electronic time and alarm control system (ETACS) ECU, and Engine ECU and a receiver antenna. Mitsubishi also incorporated an alarm system as standard equipment on all trimline vehicles. Mitsubishi stated that this is a keyless entry system in which the transponder is located in a traditional key and must be inserted into the key cylinder in order to activate the ignition. All other models of the Outlander vehicle line are equipped with an immobilizer that functions via a Keyless Operation System (KOS). The KOS utilizes a keyless system that allows the driver to push a knob in the steering lock unit to activate the ignition (instead of using a traditional key in the key cylinder) as long as the transponder is located in close proximity to the driver inside the vehicle.

Mitsubishi stated that once the ignition switch is turned to the ''on'' position, the transceiver module reads the specific ignition key code for the vehicle and transmits an encrypted message containing the key code to the electronic control unit (ECU). The immobilizer receives the key code signal transmitted from either type of key (WCM or KOS) and verifies that the key code signal is correct. The immobilizer then sends a separate encrypted start-code signal to the engine ECU to allow the driver to start the vehicle. The power train only will function if the key code matches the unique identification key code previously programmed into the ECU. If the codes do not match, the power train engine and fuel system will be disabled. Mitsubishi state that the only difference between the two keyless entry systems is the ''key'' and the method used to transmit the information from the key to the immobilizer.

In its 2014 modification, Mitsubishi stated that it will continue to offer the WCM as standard equipment for the entry models for the Outlander vehicle line but all models other than the entry models will be equipped with a One-touch Starting System (OSS). The features of the OSS are the Engine ECU, ETACS ECU, OSS ECU, KOS ECU, engine (power) switch, keyless Operation Key (transponder key) and LF antenna. The OSS utilizes a keyless system that allows the driver to press a button located on the instrument panel to activate and deactivate the ignition (instead of using a traditional key in the key cylinder) as long as the transponder is located in close proximity to the driver. Mitsubishi stated that it will also introduce another model into the Outlander vehicle line beginning with its MY 2014 vehicle.

Once the ignition switch is pushed to the ''on'' position, the transceiver module reads the specific ignition key code for the vehicle and transmits an encrypted message containing the key code to the electronic control unit (ECU) which verifies that the key is correct. The immobilizer then sends a separate encrypted start-code signal to the engine ECU to allow the driver to start the vehicle. The engine will only function if the key code matches the unique identification key code previously programmed into the ECU. If the codes do not match, the engine and fuel system will be disabled. Mitsubishi further stated that the OSS has 250 million possible codes, making successful key code duplication nearly impossible. Mitsubishi stated that the immobilizer device and the ECU share security data when first installed during vehicle assembly, making them a matched set. These matched modules will not function if taken out and reinstalled separately on other vehicles. Mitsubishi also stated that the device is extremely reliable and durable because there are no moving parts, the key does not require a separate battery and it is impossible to mechanically override the device and start the vehicle.

Mitsubishi stated that the Mitsubishi Outlander has been equipped with the immobilizer device since MY 2007.

Mitsubishi further stated that the OSS immobilizer device will be identical to the one installed on its Outlander Sport vehicle line. Mitsubishi was granted an exemption for the Outlander Sport vehicle line on February 14, 2011 by NHTSA (See 76 FR 8400) beginning with its MY 2012 vehicles. Since the agency granted Mitsubishi's exemption for its MY 2012 Outlander Sport vehicle line, there has been no available theft rate information for this vehicle. Mitsubishi also informed the agency that the Eclipse, Galant, Endeavor, Outlander, Lancer, and I-MiEv vehicle lines have been equipped with a similar type of immobilizer device since January 2000, January 2004, April 2004, September 2006, March 2007, and October 2011 respectively, and they have all been granted parts-marking exemptions by the agency. Mitsubishi also stated that its Eclipse vehicle line has been equipped with a similar device since introduction of its MY 2000 vehicles. Mitsubishi further stated that the theft rate for the MY 2000 Eclipse decreased by almost 42% when compared with that of its MY 1999 Mitsubishi Eclipse (unequipped with an immobilizer device). Mitsubishi has concluded that the proposed antitheft device for its vehicle line is no less effective than those devices in the lines for which NHTSA has already granted full exemption from the parts-marking requirements. The average theft rates using 3 MY's data for the Mitsubishi Eclipse, Galant, Endeavor, Outlander and Lancer vehicle lines are 1.7356, 4.8973, 1.1619, 0.3341 and 1.0871 respectively. Theft rate data for the Outlander Sport and i-MiEV are not available.

The agency has evaluated Mitsubishi's MY 2014 petition to modify the exemption for the Outlander vehicle line from the parts-marking requirements of 49 CFR Part 541, and has decided to grant it. Since the same aspects of performance (*i.e.,* arming and the immobilization feature) are still provided, the agency believes that the same level of protection is being met. The agency believes that the proposed device will continue to provide the five types of performance listed in § 543.6(a)(3): promoting activation; attracting attention to the efforts of unauthorized persons to enter or operate a vehicle by means other than a key; preventing defeat or circumvention of the device by unauthorized persons; preventing operation of the vehicle by unauthorized entrants; and ensuring the reliability and durability of the device.

If Mitsubishi decides not to use the exemption for this line, it should formally notify the agency. If such a decision is made, the line must be fully marked according to the requirements under 49 CFR parts 541.5 and 541.6 (marking of major component parts and replacement parts).

NHTSA suggests that if the manufacturer contemplates making any changes, the effects of which might be characterized as *de minimis,* it should consult the agency before preparing and submitting a petition to modify.

Authority: 49 U.S.C. 33106; delegation of authority at 49 CFR 1.50.

Issued on: November 21, 2012.

Christopher J. Bonanti,

Associate Administrator for Rulemaking.

[FR Doc. 2012–28813 Filed 11–27–12; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

Office of Hazardous Materials Safety; Actions on Special Permit Applications

AGENCY: Pipeline And Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Notice of actions on Special Permit Applications.

SUMMARY: In accordance with the procedures governing the application for, and the processing of, special permits from the Department of Transportation's Hazardous Material Regulations (49 CFR Part 107, Subpart B), notice is hereby given of the actions on special permits applications in (October to November 2012). The mode of transportation involved are identified by a number in the ''Nature of Application'' portion of the table below as follows: 1—Motor vehicle, 2—Rail freight, 3—Cargo vessel, 4—Cargo aircraft only, 5—Passenger-carrying aircraft. Application numbers prefixed by the letters EE represent applications for Emergency Special Permits. It should be noted that some of the sections cited were those in effect at the time certain special permits were issued.

Issued in Washington, DC, on November 13, 2012.

Donald Burger,

Chief, Special Permits and Approvals Branch.

S.P No.	Applicant	Regulation(s)	Nature of special permit thereof
MODIFICATION SPECIAL PERMIT GRANTED			
11054–M	Welker Inc. Sugar Land, TX.	49 CFR 178.36 Subpart C	To modify the special permit to authorize the containment cylinder or salvage cylinder without the internal piston.
14546–M	Linde Gas North America LLC Murray Hill, NJ.	49 CFR 180.209	To modify the special permit to authorize an alternative testing procedures for requalifying cylinders.
3549–M	Sandia National Laboratories Albuquerque, NM.	49 CFR 172.101; 173.54; 173.56; 173.62.	To modify the special permit to authorize the transportation in commerce of additional Division 1.1 hazardous materials.
12396–M	National Aeronautics and Space Administration Washington, DC.	49 CFR 180.209 and 173.302a.	To modify the special permit to authorize rail freight, cargo vessel, and passenger aircraft as additional modes of operation.
14808–M	Amtro Alfa Metalomecanica SA Portugal.	49 CFR 178.51(b), (f)(1) and (2) and (g).	To modify the special permit to authorize an additional 2.1 material.
15468–M	Prism Helicopters Inc. Wasilla, AK.	49 CFR 172.101 Column (9B).	To modify the special permit to authorize the transportation beyond the state of Alaska.

S.P No.	Applicant	Regulation(s)	Nature of special permit thereof
		NEW SPECIAL PERMIT GRANTED	
15334–N	Floating Pipeline Company Incorporated Halifax, Nova Scotia.	49 CFR 173.302a	To authorize the manufacture, marking, sale and use of 40′ GTM (gas transport module) Intermodal Shipping Containers designed based on ASME Section VIII, Division 3, 2010 Edition for composite reinforced pressure vessels permanently fitted within an ISO frame. (mode 1).
15558–N	3M Company St. Paul, MN	49 CFR 173.212, 172.302(a)(c).	To authorize the manufacture, marking, sale, and use of service motor vehicles for use in transporting a corrosive solid material in alternative packaging. (modes 1, 3).
15569–N	Vexxel Composites, LLC Brigham City, UT.	49 CFR 173.302a(a)(1), 175.3, and 180.205.	To authorize the manufacture, marking, sale, and use of non-DOT specification fully-wrapped carbon fiber reinforced seamless stainless steel lined cylinders that meets all requirements of ISO 11119–2 for use in transporting 2.2 materials. (modes 1, 2, 3, 4, 5).
15626–N	EC Source Aviation, LLC Mesa, AZ.	49 CFR 49 CFR Parts 172.101, Column (9b), 172.204(c)(3), 173.27(b)(2), 175.30(a)(1), 172.200, 172.300, and 172.400.	To authorize the transportation in commerce of certain hazardous materials by cargo aircraft including by external load in remote areas without being subject to hazard communication requirements and quantity limitations where no other means of transportation is available. (modes 3, 4).
15658–N	Xcel Energy Monticello, MN.	49 CFR 173.427(b)(1), 173.465(c), 173.465(d).	To authorize the transportation in commerce of certain Radioactive material in alternative packaging by highway. A copy of the environmental assessment can be located at *http://www.regulations.gov/#!documentDetail;D=PHMSA–2012–0165–0002* (mode 1).
15642–N	Praxair Distribution, Inc. Danbury, CT.	49 180.205 and 180.209(a)(b), 180.213(b), and 180.213(f)(2).	To authorize the transportation in commerce of DOT Specification 3AL cylinders, cylinders manufactured under DOT–SP 12440, and ISO 7866 cylinders containing certain compressed gases when retested by a 100% ultrasonic examination in lieu of the internal visual and the hydrostatic retest. (modes 1, 2, 3, 4, 5).
		EMERGENCY SPECIAL PERMIT GRANTED	
15428–M	Space Exploration Technologies Corp. Hawthorne, CA.	49 CFR Part 172 and 173	To modify the special permit to authorize additional Division 2.2 and Class 8 materials. (mode 1).
15729–N	Antonov Company, t/a Antonov Airlines Kiev, NH.	49 CFR § 172.101 Column (9B).	To authorize the one-time transportation in commerce of anhydrous ammonia in heat pipes which is forbidden for transportation by cargo only aircraft. (mode 4).
15748–N	Wal-Mart Stores, Inc. Bentonville, AR.	49 CFR part 172, part 173 and part 177.	To authorize the one-time, one-way transportation in commerce of certain hazardous materials from damaged or stucturally-impaired retail stores impacted by Hurricane Sandy to a temporary warehousing facility for approximately 10 miles by motor vehicle. (mode 1).
15751–N	Williams Gas Pipeline White Have, PA.	49 CFR 177.834(h), 178.700(c)(1).	To authorize the use of non-DOT specification metal refueling tanks containing Class 3 liquids and the on and off loading while the container remains on the truck. (mode 1).
15691–N	Department of Defense Scotts AFB, IL.	49 CFR 180.209	To authorize the transportation in commerce of certain cylinders manufactured under DOT–SP 9421 and DOT–SP 9909 that are passed their test date for requalification. (modes 1, 2, 3, 4).
15752–N	Hurricane Sandy Response	49 CFR 173.242 and Part 172 Subpart C, Subpart D, Subpart F and Subpart I.	To authorize the transportation in commerce of certain hazardous materials in support of the recovery and relief in response to Hurricane Sandy. (mode 1).
15724–N	Honeywell FF & T, LLC Albuquerque, NM.	49 CFR 173.305(c)	To authorize the transportation in commerce of certain Division 2.2 gases in cylinders with openings not in the head or base of the cylinder. (mode 1) .
		MODIFICATION SPECIAL PERMIT WITHDRAWN	
14206–M	Digital Wave Corporation centennial, CO.	49 CFR 180.205	To modify the special permit to authorize ISO 9809–2 cylinders be UE recertified.

S.P No.	Applicant	Regulation(s)	Nature of special permit thereof
13998–M	3AL Testing Corp. Centennial, CO.	49 CFR 172.203(a); 172.302a(b)(2), (4)(5); 180.205(f)(g); 180.209(a),(b) (1)(iv).	To modify the special permit to authorize the ultrasonic examination of ISO 9809–2 cylinders, and the removal of Gulf Coast Hydrostatic Tests as an agent.

DENIED

14372–M	Request by Kidde Aerospace and Defense Wilson, NC October 22, 2012. To modify the special permit to add additional cylinders and to allow production markings to be obliterated as part of the retest of those cylinders.
12102–M	Request by EQ Industrial Services, Inc. Ypsilanti, MI October 4, 2012. To modify the special permit to authorize additional Class 1 materials authorized to be transported as Division 4.1.
15681–N	Request by Micronesian Aviation Corporation dba Americopters Saipan, MP October 16, 2012. To authorize the transportation in commerce of certain hazardous materials by Part 133 Rotorcraft External Load Operations, attached to or suspended from an aircraft, in remote areas of the US without meeting certain hazard communication and stowage requirements.
15686–N	Request by Smoky Mountain Helicopters, Inc. Hanapepe, HI October 16, 2012. To authorize the transportation in commerce of certain hazardous materials by 14 CFR Part 133 Rotorcraft External Load Operations transporting hazardous materials attached to or suspended from an aircraft, in remote areas of the US only, without being subject to hazard communication requirements, quantity limitations and certain loading and stowage requirements.
15718–N	Request by Siex Burgos, Spain, October 16, 2012. To authorize the transportation in commerce of Division 2.2 gases in non-DOT specification cylinders
15688–N	Request by Airborne Aviation Lihue, HI October 16, 2012. To authorize the transportation in commerce of certain hazardous materials by 14 CFR Part 133 Rotorcraft External Load Operations transporting hazardous materials attached to or suspended from an aircraft, in remote areas of the US only, without being subject to hazard communication requirements, quantity limitations and certain loading and stowage requirements.
12135–M	Request by Daicel Safety Systems, Inc. Hyogo Prefecture 671–1681, October 16, 2012. To modify the special permit to authorize a new design of non-DOT specification cylinders (pressure vessels) for use as components of automobile vehicle safety systems.

[FR Doc. 2012–28583 Filed 11–27–12; 8:45 am]
BILLING CODE 4909–60–M

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

Notice of Applications for Modification of Special Permit

AGENCY: Office of Hazardous Materials Safety, Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: List of applications for modification of special permits.

SUMMARY: In accordance with the procedures governing the application for, and the processing of, special permits from the Department of Transportation's Hazardous Material Regulations (49 CFR part 107, Subpart B), notice is hereby given that the Office of Hazardous Materials Safety has received the applications described herein. This notice is abbreviated to expedite docketing and public notice. Because the sections affected, modes of transportation, and the nature of application have been shown in earlier **Federal Register** publications, they are not repeated here. Requests for modification of special permits (e.g. to provide for additional hazardous materials, packaging design changes, additional mode of transportation, etc.) are described in footnotes to the application number. Application numbers with the suffix ''M'' denote a modification request. These applications have been separated from the new application for special permits to facilitate processing.

DATES: Comments must be received on or before December 13, 2012.

Address Comments To: Record Center, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, Washington, DC 20590.

Comments should refer to the application number and be submitted in triplicate. If confirmation of receipt of comments is desired, include a self-addressed stamped postcard showing the special permit number.

FOR FURTHER INFORMATION CONTACT: Copies of the applications are available for inspection in the Records Center, East Building, PHH–30, 1200 New Jersey Avenue Southeast, Washington, DC or at *http://regulations.gov.*

This notice of receipt of applications for modification of special permit is published in accordance with Part 107 of the Federal hazardous materials transportation law (49 U.S.C. 5117(b); 49 CFR 1.53(b)).

Issued in Washington, DC, on November 13, 2012.

Donald Burger,

Chief, General Approvals and Permits.

Application No.	Docket No.	Applicant	Regulation(s) affected	Nature of special permit thereof

MODIFICATION SPECIAL PERMITS

10964–M	.....	Kidde Aerospace & Defense Wilson, NC.	49 CFR 173.302(a); 175.3.	To modify the permit to authorize a rework procedure to allow fire extinguishers which were ''steel stamped'' to be returned to within original specifications.
14003–M	.....	INOCOM Inc. Riverside, CA.	49 CFR 173.302(a)(1), 173.304(a) and 180.205.	To modify the special permit by replacing the current CFFC gunfire test with the ISO–11119–2 gunfire test for cylinders with diameter of 120 mm or less.

Application No.	Docket No.	Applicant	Regulation(s) affected	Nature of special permit thereof
14951–M		Lincoln Composites Lincoln, NE.	49 CFR 173.302a	To modify the special permit to authorize an alternative fire protection system.
15461–M		Kidde Products High Bentham.	49 CFR 171.23	To modify the special permit to extend the expiration date and add an additional location to the authorized shipment locations.
15634–M		SodaStream USA Cherry Hill, NJ.	49 CFR 171.2(k)	To modify the special permit to authorize rail, freight, cargo vessel, cargo aircraft, and passenger aircraft as additional modes of transportation.
15647–M		Thunderbird Cylinder, Inc. Phoenix, AZ.	49 CFR 179.7 and 180.505.	To reissue the special permit originally issued on an emergency basis for retesting of certain DOT Specification and non-DOT Specification multi unit tank car tanks.
15689–M		AVL Test Systems Inc. Plymouth, MI.	49 CFR 172.200, 177.834	To reissue the special permit originally issued on an emergency basis and add rail freight as an additional mode of transportation authorized.

[FR Doc. 2012–28588 Filed 11–27–12; 8:45 am]
BILLING CODE 4909–60–M

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

Notice of Application for Special Permits

AGENCY: Office of Hazardous Materials Safety, Pipeline and Hazardous Materials Safety Administration (PISA), DOT.

ACTION: List of applications for special permits.

SUMMARY: In accordance with the procedures governing the application for, and the processing of, special permits from the Department of Transportation's Hazardous Material Regulations (49 CFR part 107, Subpart B), notice is hereby given that the Office of Hazardous Materials Safety has received the application described herein. Each mode of transportation for which a particular special permit is requested is indicated by a number in the ''Nature of Application'' portion of the table below as follows: 1—Motor vehicle, 2—Rail freight, 3—Cargo vessel, 4—Cargo aircraft only, 5—Passenger-carrying aircraft.

DATES: Comments must be received on or before December 28, 2012.

Address Comments To: Record Center, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, Washington, DC 20590.

Comments should refer to the application number and be submitted in triplicate. If confirmation of receipt of comments is desired, include a self-addressed stamped postcard showing the special permit number.

FOR FURTHER INFORMATION CONTACT: Copies of the applications are available for inspection in the Records Center, East Building, PHH–30, 1200 New Jersey Avenue Southeast, Washington, DC or at *http://regulations.gov.*

This notice of receipt of applications for special permit is published in accordance with Part 107 of the Federal hazardous materials transportation law (49 U.S.C. 5117(b); 49 CFR 1.53(b)).

Issued in Washington, DC, on November 13, 2012.

Donald Burger,

Chief, General Approvals and Permits.

Application No.	Docket No.	Applicant	Regulation(s) affected	Nature of special permits thereof
NEW SPECIAL PERMITS				
15733–N		Lockheed Martin Missiles and Fire Control Dallas, TX.	49 CFR 1075.105, 178.500, 173.60.	To authorize the transportation in commerce of explosives in non-UN approved packaging. (modes 1, 2).
15735–N		W.R. Grace Grace-Conn Columbia, MD.	49 CFR 173.242	To authorize the transportation in commerce of a Class 4.3 material in an IBC. (mode 1).
15741–N		Pacific Consolidated Industries, LLC Riverside, CA.	49 CFR 173.302(f)(3), (4), (5); 175.501(e)(3).	To authorize the transportation of oxidizing gases by cargo aircraft without a strong outer packaging capable of passing the Flame Penetration Restance Test, the Thermal Resistance Test, and to waive marking the outer package. (modes 4, 5).
15743–N		Midwest Cylinder, Inc. Cleves, OH	49 CFR 180.211(c)(2)(i).	To authorize the repair of certain DOT 4L cylinders without requiring pressure testing. (mode 1).
15744–N		Praxair Distribution, Inc. Danbury, CT.	49 CFR 180.205; 180.209.	To authorize the transportation in commerce of certain cylinders that have been ultrasonically retested for use in transporting Division 2.1, 2.2, and 2.3 materials. (modes 1, 2, 3, 4).
15745–N		Praxair Distribution, Inc. Danbury, CT.	49 CFR 173.301(f)	To authorize the transportation in commerce of certain foreign manufactured cylinders qualified under an alternative test method and which are not equipped with pressure relief devices. (modes 1, 3).

Application No.	Docket No.	Applicant	Regulation(s) affected	Nature of special permits thereof
15746–N		Siex Burgos, Spain	49 CFR 173.302a; 173.304a.	To authorize the transportation in commerce of Division 2.2 gases in cylinders manufactured according to the Eurpoean Directive for Transportable Pressure Vessels. (modes 1, 3).
15747–N		UPS Atlanta, GA	49 CFR 171.2(f); 177.817(a); 177.817(c); 177.817(e); 177.802; 172.203(a); 172.602(c)(1);.	To authorize the use of electronic shipping papers. (mode 1).

[FR Doc. 2012–28590 Filed 11–27–12; 8:45 am]

BILLING CODE 4909–60–M

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

Notice of Delays in Processing of Special Permits Applications

AGENCY: Office of Hazardous Materials Safety, Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: List of applications delayed more than 180 days.

SUMMARY: In accordance with the requirements of 49 U.S.C. 5117(c), PHMSA is publishing the following list of special permit applications that have been in process for 180 days or more. The reason(s) for delay and the expected completion date for action on each application is provided in association with each identified application.

FOR FURTHER INFORMATION CONTACT: Ryan Paquet, Director, Office of Hazardous Materials Special Permits and Approvals, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, East Building, PHH–30, 1200 New Jersey Avenue Southeast, Washington, DC 20590–0001, (202) 366–4535.

Key to ''Reason for Delay''

1. Awaiting additional information from applicant.
2. Extensive public comment under review.
3. Application is technically complex and is of significant impact or precedent-setting and requires extensive analysis.
4. Staff review delayed by other priority issues or volume of special permit applications.

Meaning of Application Number Suffixes

N—New application
M—Modification request
R—Renewal Request
P—Party to Exemption Request

Issued in Washington, DC, on November 13, 2012.

Donald Burger,

Chief, General Approvals and Permits.

Application No.	Applicant	Reason for delay	Estimated date of completion
MODIFICATION TO SPECIAL PERMITS			
11914–M	Cascade Designs, Inc. Seattle, WA	4	12–31–2012
NEW SPECIAL PERMIT APPLICATIONS			
15650–N	JL Shepherd & Associates San Fernando, CA	3	12–31–2012

[FR Doc. 2012–28585 Filed 11–27–12; 8:45 am]

BILLING CODE 4910–60–M

DEPARTMENT OF THE TREASURY

Fiscal Service

Financial Management Service; Proposed Collection of Information: Electronic Funds Transfer (EFT) Market Research Study

AGENCY: Financial Management Service, Fiscal Service, Treasury.

ACTION: Notice and Request for comments.

SUMMARY: The Financial Management Service, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on a continuing information collection. By this notice, the Financial Management Service solicits comments concerning the ''Electronic Funds Transfer (EFT) Market Research Study.''

DATES: Written comments should be received on or before January 28, 2013.

ADDRESSES: Direct all written comments to Financial Management Service, Records and Information Management Branch, Room 135, 3700 East West Highway, Hyattsville, Maryland, 20782.

FOR FURTHER INFORMATION CONTACT: Request for additional information should be directed to Walt Henderson, EFT Strategy Division, 401 14th Street SW., Room 303, Washington, DC 20227, 202–874–6624.

SUPPLEMENTARY INFORMATION: Pursuant to the Paperwork Reduction Act of 1995, (44 U.S.C. 3506(c)(2)(A)), the Financial Management Service solicits comments on the collection of information described below:

Title: Electronic Funds Transfer (EFT) Market Research Study.

OMB Number: 1510–0074.

Form Number: None.

Abstract: Study of Federal benefit recipients to identify barriers to significant increases in use of EFT for benefit and vendor payments.

Current Action: Extension of currently approved collection.

Type of Review: Regular.

Affected Public: Individuals or households, Federal Government.

Estimated Number of Respondents: 19,500.

Estimated Time per Respondent: 3 hours 30 minutes.

Estimated Total Annual Burden Hours: 7,500.

Comments: Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up cost and cost of operation, maintenance and purchase of services to provide information.

Dated: November 21, 2012.

Sheryl R. Morrow,

Assistant Commissioner, Payment Management.

[FR Doc. 2012–28710 Filed 11–27–12; 8:45 am]

BILLING CODE 4810–35–M

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 2439

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13(44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 2439, Notice to Shareholder of Undistributed Long-Term Capital Gains.

DATES: Written comments should be received on or before January 28, 2013 to be assured of consideration.

ADDRESSES: Direct all written comments to R. Joseph Durbala, Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Martha R. Brinson, at (202) 622–3869, or at Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet, at *Martha.R.Brinson@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: Notice to Shareholder of Undistributed Long-Term Capital Gains.

OMB Number: 1545–0145.

Form Number: 2439.

Abstract: Form 2439 is used by regulated investment companies or real estate investment trusts to show shareholders the amount of tax paid on undistributed capital gains under section 852(b)(3)(D) or 857(b)(3)(D).

Current Actions: There are no changes being made to the form at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit institutions.

Estimated Number of Respondents: 6,275.

Estimated Time per Respondent: 4 hrs., 47 min.

Estimated Total Annual Burden Hours: 29,995.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: November 15, 2013.

R. Joseph Durbala,

IRS Reports Clearance Officer.

[FR Doc. 2012–28788 Filed 11–27–12; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 4506

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 4506, Request for Copy of Tax Return.

DATES: Written comments should be received on or before January 28, 2013 to be assured of consideration.

ADDRESSES: Direct all written comments to R. Joseph Durbala, Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Martha R. Brinson, (202) 622–3869, or at Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet, at *Martha.R.Brinson@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: Request for Copy of Tax Return.

OMB Number: 1545–0429.

Form Number: Form 4506.

Abstract: Internal Revenue Code section 7513 allows taxpayers to request a copy of a tax return or related documents. Form 4506 is used for this purpose. The information provided will be used for research to locate the tax form and to ensure that the requestor is the taxpayer or someone authorized by the taxpayer to obtain the documents requested.

Current Actions: There are no changes being made to the form at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations, individuals or households, farms, and Federal, state, local, or tribal governments.

Estimated Number of Respondents: 325,000.

Estimated Time per Respondent: 48 min.

Estimated Total Annual Burden Hours: 260,000.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: November 15, 2012.

R. Joseph Durbala,

IRS Reports Clearance Officer.

[FR Doc. 2012–28789 Filed 11–27–12; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 9452

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 9452, Filing Assistance Program (Do you have to file a Federal Income Tax Return?).

DATES: Written comments should be received on or before January 28, 2013 to be assured of consideration.

ADDRESSES: Direct all written comments to R. Joseph Durbala, Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Martha R. Brinson, at (202) 622–3869, or at Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet, at *Martha.R.Brinson@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Filing Assistance Program (Do you have to file a Federal Income Tax Return?).

OMB Number: 1545–1316.

Form Number: 9452.

Abstract: Form 9452 aids individuals in determining whether it is necessary to file a Federal tax return. Form 9452 will not be collected by IRS; it is to be used by individuals at their discretion. Form 9452 is used by the Service's taxpayer assistance programs. It is also available on the internet, and it is distributed in an annual mail out to taxpayers.

Current Actions: There are no changes being made to the form at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals or households.

Estimated Number of Respondents: 1,650,000.

Estimated Time per Respondent: 30 min.

Estimated Total Annual Burden Hours: 825,000.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: November 15, 2012.

R. Joseph Durbala,

IRS Reports Clearance Officer.

[FR Doc. 2012–28791 Filed 11–27–12; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Regulation Project

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Election to Amortize Start-Up Expenditures for Active Trade or Business.

DATES: Written comments should be received on or before January 28, 2013 to be assured of consideration.

ADDRESSES: Direct all written comments to R. Joseph Durbala, Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the regulation should be directed to Martha R. Brinson, at (202) 622–3869, or at Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the internet, at *Martha.R.Brinson@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Election to Amortize Start-Up Expenditures for Active Trade or Business.

OMB Number: 1545–1582.

Regulation Project Number: T.D. 8797.

Abstract: Section 1.195–1 of the regulation provides that start-up expenditures may, at the discretion of the taxpayer, be amortized over a period of not less than 60 months beginning with the month the active trade or business begins. Taxpayers may elect to amortize start-up expenditures by filing a statement with their tax return for the taxable year in which the trade or business begins.

Current Actions: There is no change to this existing regulation.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 150,000.

Estimated Time per Respondent: 15 minutes.

Estimated Total Annual Burden Hours: 37,500.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: November 9, 2012.

R. Joseph Durbala,

IRS Reports Clearance Officer.

[FR Doc. 2012–28793 Filed 11–27–12; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Regulation Project

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Definition of Private Activity Bonds.

DATES: Written comments should be received on or before January 28, 2013 to be assured of consideration.

ADDRESSES: Direct all written comments to R. Joseph Durbala, Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the regulations should be directed to Martha R. Brinson at Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or at (202) 622–3869, or through the Internet at *Martha.R.Brinson@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Definition of Private Activity Bonds.

OMB Number: 1545–1451.

Regulation Project Number: TD 8712.

Abstract: Internal Revenue Code section 103 provides generally that interest on certain State or local bonds is excluded from gross income. However, under Code sections 103(b)(1) and 141, interest on private activity bonds (other than qualified bonds) is not excluded. This regulation provides rules, for purposes of Code section 141, to determine how bond proceeds are measured and used and how debt service for those bonds is paid or secured.

Current Actions: There is no change to this existing regulation.

Type of Review: Extension of currently approved collection.

Affected Public: State, local or tribal governments.

Estimated Number of Respondents: 10,100.

Estimated Time per Respondent: 2 hours, 50 minutes.

Estimated Total Annual Burden Hours: 30,100.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: November 9, 2012.

R. Joseph Durbala,

IRS Reports Clearance Officer.

[FR Doc. 2012–28800 Filed 11–27–12; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

[LR–58–83]

Proposed Collection; Comment Request for Regulation Project

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13(44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Related Group Election With Respect to Qualified Investments in Foreign Base Company Shipping Operations.

DATES: Written comments should be received on or before January 28, 2013 to be assured of consideration.

ADDRESSES: Direct all written comments to R. Joseph Durbala, Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the regulations should be directed to Martha R. Brinson at Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or at (202)622–3869, or through the Internet at *Martha.R.Brinson@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Related Group Election With Respect to Qualified Investments in Foreign Base Company Shipping Operations.

OMB Number: 1545–0755.

Regulation Project Number: LR–58–83 (TD 7959-Final).

Abstract: The election described in the attached justification converted an annual election to an election effective until revoked. The computational information required is necessary to assure that the U.S. shareholder correctly reports any shipping income of its controlled foreign corporations which is taxable to that shareholder.

Current Actions: There is no change to this existing regulation.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 100.

Estimated Time per Respondent: 2 hours, 3 minutes.

Estimated Total Annual Burden Hours: 205

The following paragraph applies to all the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: November 15, 2012.

R. Joseph Durbala,

IRS Reports Clearance Officer.

[FR Doc. 2012–28801 Filed 11–27–12; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Regulation Project

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Information Reporting Requirements for Certain Payments Made on Behalf of Another Person, Payments to Joint Payees, and Payments of Gross Proceeds From Sales Involving Investment Advisers.

DATES: Written comments should be received on or before January 28, 2013 to be assured of consideration.

ADDRESSES: Direct all written comments to R. Joseph Durbala, Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the regulations should be directed to Martha R. Brinson, at Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or at (202) 622–3869, or through the Internet at *Martha.R.Brinson@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Information Reporting Requirements for Certain Payments Made on Behalf of Another Person, Payments to Joint Payees, and Payments of Gross Proceeds From Sales Involving Investment Advisers

OMB Number: 1545–1705.

Regulation Project Number: TD 9010.

Abstract: This regulation under section 6041 clarifies who is the payee for information reporting purposes if a check or other instrument is made payable to joint payees, provides information reporting requirements for escrow agents and other persons making payments on behalf of another person, and clarifies that the amount to be reported as paid is the gross amount of the payment. The regulation also removes investment advisers from the list of exempt recipients for information reporting purposes under section 6045.

Current Actions: There is no change to this existing regulation.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

The estimate of the reporting burden in § 1.6041–1 is reflected in the burden of Form 1099–MISC. The estimate of the reporting burden in § 1.6045–1 is

reflected in the burden of Form 1099–B.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: November 9, 2012.

R. Joseph Durbala,

IRS Reports Clearance Officer.

[FR Doc. 2012–28802 Filed 11–27–12; 8:45 am]

BILLING CODE 4830–01–P

FEDERAL REGISTER

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Part II

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Southern Selkirk Mountains Population of Woodland Caribou; Final Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R1–ES–2011–0096: 4500030114]

RIN 1018–AX38

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Southern Selkirk Mountains Population of Woodland Caribou

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service, designate critical habitat for the southern Selkirk Mountains population of woodland caribou (*Rangifer tarandus caribou*) under the Endangered Species Act. In total, approximately 30,010 acres (12,145 hectares) is being designated as critical habitat. The critical habitat is located in Boundary County, Idaho, and Pend Oreille County, Washington. We are finalizing this action in compliance with our obligation under the Act and in compliance with a court-approved settlement agreement. The effect of this regulation is to conserve the habitat essential to the southern Selkirk Mountains population of woodland caribou.

DATES: This rule becomes effective on December 28, 2012.

ADDRESSES: This final rule and the associated final economic analysis are available on the Internet at *http://www.regulations.gov.* Comments and materials received, as well as supporting documentation used in preparing this final rule, are available for public inspection, by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Idaho Fish and Wildlife Office, 1387 S. Vinnell Way, Room 368, Boise, ID 83709; telephone 208–378–5243; facsimile 208–378–5262.

The coordinates or plot points or both from which the map for this critical habitat designation was generated are included in the administrative record and are available at *http://www.fws.gov/idaho/SpeciesNews.htm,* at *http://www.regulations.gov* at Docket No. FWS–R1–ES–2011–0096, and at the Idaho Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**). Any additional tools or supporting information developed for this critical habitat designation is available at the Fish and Wildlife Service Web site and Field Office set out above, and may also be on *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Brian Kelly, State Supervisor, U.S. Fish and Wildlife Service, Idaho Fish and Wildlife Office (see **ADDRESSES**). If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Executive Summary

Why we need to publish a rule. This is a final rule to designate critical habitat for the southern Selkirk Mountains population of woodland caribou (*Rangifer tarandus caribou*), currently listed as an endangered species under the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*) (Act). Under the Act, any species that is determined to be an endangered or threatened species requires critical habitat to be designated, to the maximum extent prudent and determinable. Designations and revisions of critical habitat can only be completed through rulemaking. The critical habitat area we are designating in this rule constitutes our current best assessment of the areas that meet the definition of critical habitat for the southern Selkirk Mountains population of woodland caribou. Here we are designating approximately 30,010 acres (ac) (12,145 hectares (ha)) in one unit within Boundary County, Idaho, and Pend Oreille County, Washington, as critical habitat for the southern Selkirk Mountains population of woodland caribou. This designation represents a reduction of approximately 345,552 ac (139,840 ha) from the critical habitat originally proposed for designation (76 FR 74018, November 30, 2011); and reflects a 1,000 foot (ft) (about 300 meter (m)) change in elevation from 4,000 ft (1,220 m) in the proposed rule, to an elevation at or above 5,000 ft (1,520 m) in the final critical habitat designation. Literature and information we have reviewed, and peer review comments received, confirm that although caribou may use elevations below 5,000 ft (1,520 m), habitats at this elevation and above are essential to their conservation. This revision is more fully explained in the ''*Criteria Used to Define Critical Habitat''* section. The primary factors that were considered and influenced this change from the proposed rule included: (1) A revised determination of the geographical area occupied by the southern Selkirk Mountains population of woodland caribou at the time of listing, based on comments we received, including peer reviewers, which caused us to reevaluate surveys conducted by Scott and Servheen (1984, 1985); (2) census monitoring documenting low numbers of individual caribou observed in the United States during those annual surveys; (3) caribou observations within the United States for several years have consistently been limited to areas close to the United States–Canada border; (4) information and literature reporting the overall decline of the subspecies mountain caribou (*Rangifer tarandus caribou*) across its range, and in particular the decline of woodland caribou populations in the southern extent of their range, including the southern Selkirk Mountains population of woodland caribou; (5) information on areas currently conserved and managed for the conservation of woodland caribou in the Selkirk Mountains in British Columbia, Canada, including the status of the Canadian recovery actions for mountain caribou; and (6) the applicability as well as the status of the recovery objectives identified in the 1994 Selkirk Mountains Woodland Caribou Recovery Plan (USFWS 1994).

All of the area being designated as critical habitat is federally owned lands under management of the U.S. Forest Service (USFS). The areas being designated were occupied at the time of listing under the Act (49 FR 7390: February 29, 1984), and are essential to the conservation of the southern Selkirk Mountains population of woodland caribou.

We have prepared an economic analysis of the designation of critical habitat. In order to consider economic impacts, we have prepared an analysis of the economic impacts of the critical habitat designation and related factors. We announced the availability of the draft economic analysis (DEA) in the **Federal Register** on May 31, 2012 (77 FR 32075), allowing the public to provide comments on our analysis. We have incorporated the comments and have completed the final economic analysis (FEA) concurrently with this final determination.

Peer review and public comment. We sought comments from independent specialists to ensure that our designation is based on scientifically sound data and analyses. We obtained opinions from four knowledgeable individuals with scientific expertise to review our technical assumptions, analysis, and whether or not we had used the best available information. These peer reviewers provided additional information, clarifications, and suggestions to improve this final rule. Information we received from peer review is incorporated in this final critical habitat designation. We also considered all comments and

information received from the public during the comment periods.

Background

It is our intent to discuss in this final rule only those topics directly relevant to the development and designation of critical habitat for the southern Selkirk Mountains population of woodland caribou under the Act (16 U.S.C. 1531 *et seq.*). For more information on the biology and ecology of the southern Selkirk Mountains population of woodland caribou, refer to the final listing rule published in the **Federal Register** on February 29, 1984 (49 FR 7390), and the 1985 final recovery plan (USFWS 1985), which was revised in 1994 (USFWS 1994), and is available from the Idaho Fish and Wildlife Office (see **ADDRESSES** section). For information on southern Selkirk Mountains population of woodland caribou proposed critical habitat, refer to the proposed rule published in the **Federal Register** on November 30, 2011 (76 FR 74018). Information on the associated DEA for the proposed rule to designate revised critical habitat was published in the **Federal Register** on May 31, 2012 (77 FR 32075).

Nomenclature

In 1984, we published a final rule listing the transboundary population of woodland caribou (*Rangifer tarandus caribou*) found in Idaho, Washington, and southern British Columbia, '' * * * sometimes known as the southern Selkirk Mountain herd'' (49 FR 7390; February 29, 1984). At that time woodland caribou, including the transboundary population, were a recognized subspecies of caribou (*R. tarandus*). Within the woodland caribou subspecies, caribou populations are often further divided into three different ''ecotypes'': Boreal, northern, and mountain, based on differences in habitat use, feeding behavior, and migration patterns (Hatter 2000, p. 631; Mountain Caribou Science Team 2005, p. 1).

The southern Selkirk Mountains population of woodland caribou is included within the mountain caribou ecotype (mountain caribou) that currently occupies southeastern British Columbia (B.C.), northern Idaho, and northeastern Washington near the international border to northeast of Prince George (Wittmer *et al.* 2005, p. 408). The mountain caribou ecotype is distinguished from other woodland caribou ecotypes by behavioral and ecological characteristics, rather than genetic characteristics that conclude all woodland caribou ecotypes are genetically similar (Mountain Caribou Science Team 2005, p. 1). The mountain caribou ecotype is closely associated with high-elevation, late-successional, coniferous forests where their primary winter food, arboreal lichens, occurs.

The term ''mountain caribou'' is a common designation used throughout the scientific literature to describe the mountain/arboreal-lichen feeding ecotype of woodland caribou populations found in the mountainous regions of southeastern British Columbia, including the transboundary southern Selkirk Mountains population of woodland caribou (Mountain Caribou Science Team 2005, p. 1). In this final rule, use of the term mountain caribou refers to descriptions of the subspecies woodland caribou in general, and we use the term southern Selkirk Mountains population of woodland caribou when referencing the listed transboundary population.

Previous Federal Actions

In 1980, the Service received petitions to list the South Selkirk Mountains population of woodland caribou as endangered under the Endangered Species Act from the Idaho Department of Fish and Game (IDFG) and Dean Carrier, a U.S. Forest Service (USFS) staff biologist and former chairman of the International Mountain Caribou Technical Committee (IMCTC). At that time, the population was believed to consist of 13 to 20 animals (48 FR 1722). Following a review of the petition and other data readily available, the southern Selkirk Mountains woodland caribou population in northeastern Washington, northern Idaho, and southeastern B.C. was listed as endangered under the Act's emergency procedures on January 14, 1983 (48 FR 1722). A second emergency rule was published on October 25, 1983 (48 FR 49245), and a final rule listing the southern Selkirk Mountains woodland caribou population as endangered was published on February 29, 1984 (49 FR 7390). The designation of critical habitat was determined to be not prudent at that time, since increased poaching could result from the publication of maps showing areas used by the species. A Management Plan/Recovery Plan for Selkirk Caribou was approved by the Service in 1985 (USFWS 1985), and revised in 1994 (USFWS 1994).

Notices of 90-day findings on two petitions to delist the southern Selkirk Mountains population of woodland caribou were published in the **Federal Register** on November 29, 1993 (58 FR 62623), and November 1, 2000 (65 FR 65287). Both petitions were submitted by Mr. Peter B. Wilson, representing the Greater Bonners Ferry Chamber of Commerce, in Bonners Ferry, Idaho. Our response to both petitions stated that the petitions did not present substantial scientific or commercial information indicating that delisting of the woodland caribou may be warranted.

On August 17, 2005, a complaint was filed in Federal district court challenging two biological opinions issued by the Service, and USFS management actions within southern Selkirk Mountains caribou habitat and the recovery area. The plaintiffs included Defenders of Wildlife, Conservation Northwest, the Lands Council, Selkirk Conservation Alliance, Idaho Conservation League, and Center for Biological Diversity. The lawsuit challenged, in part, no jeopardy biological opinions on the USFS Land and Resource Management Plans for the Idaho Panhandle (IPNF) and Colville (CNF) National Forests, and the USFS' failure to comply with the incidental take statements in the biological opinions.

In December 2005, the Court granted a preliminary injunction prohibiting snowmobile trail grooming within the caribou recovery area on the IPNF during the winter of 2005–2006. In November 2006, the Court granted a modified injunction restricting snowmobiling and snowmobile trail grooming on portions of the IPNF within the southern Selkirk Mountains caribou recovery area. On February 14, 2007, the Court ordered a modification of the current injunction to add a protected caribou travel corridor connecting habitat in the United States portion of the southern Selkirk Mountains with habitat in British Columbia. This injunction is currently in effect, pending the completion of section 7 consultation on the IPNF's proposed winter travel plan.

On April 11, 2006, a notice of initiation of 5-year reviews for 70 species in Idaho, Oregon, Washington, and Hawaii, and Guam was published in the **Federal Register** (69 FR 18345), including the southern Selkirk Mountains population of woodland caribou. The Southern Selkirk Mountains Caribou Population 5-Year Review was completed December 5, 2008 (USFWS, 2008a).

On December 6, 2002, the Defenders of Wildlife, Lands Council, Selkirk Conservation Alliance, and Center for Biological Diversity (plaintiffs) petitioned the Service to designate critical habitat for the endangered southern Selkirk Mountains population of woodland caribou. On February 10, 2003, we acknowledged receipt of the plaintiff's petition, and stated we were unable to address the petition at that

time due to budgetary constraints. On January 15, 2009, a complaint for declaratory and injunctive relief (*Defenders of Wildlife et al.,* v. *Salazar,* CV–09–15–EFS) was filed in Federal District Court, alleging that the Service's failure to make a decision more than 6 years after the petition was submitted violated the Administrative Procedure Act (5 U.S.C. 551–559, 701–706). In a stipulated settlement agreement, we agreed to make a critical habitat prudency determination, and if determined to be prudent, to submit a proposed critical habitat rule to the **Federal Register** on or before November 20, 2011, which was accomplished. We also agreed to deliver a final critical habitat rule to the **Federal Register** by November 20, 2012.

A proposed rule (76 FR 74018) to designate approximately 375,562 ac (151,985 ha) as critical habitat in Boundary and Bonner Counties in Idaho, and Pend Oreille County in Washington was submitted to the **Federal Register** on November 20, 2011, and published on November 30, 2011.

On May 9, 2012, we received a petition dated May 9, 2012, from Bonner County, Idaho, and the Idaho State Snowmobile Association, which calls into question whether the southern Selkirk Mountains population of woodland caribou is a listable entity under the Act. We are developing a response to that petition.

Summary of Comments and Recommendations

We requested written comments from the public on the proposed designation of critical habitat for the southern Selkirk Mountains population of woodland caribou during three comment periods. The first comment period, associated with the publication of the proposed rule (76 FR 74018), opened on November 30, 2011, and closed on January 30, 2012. We contacted Federal, State, Tribal, and local agencies, scientific organizations, and other interested parties and invited them to comment on the proposed rule. In response to a request we received during the first public comment period from Idaho's Governor C.L. ''Butch'' Otter, the Kootenai Tribe of Idaho, and Boundary County, Idaho, to allow the public more time to submit comments and to hold an informational session and public hearing, we opened a second comment period on March 21, 2012 (77 FR 16512), for an additional 60 days. The Service-hosted informational session and public hearing were held in Bonner's Ferry, Idaho, on April 28, 2012. A third public comment period, associated with the publication of the DEA of the proposed designation and an amended required determinations section, opened on May 31, 2012, and closed on July 2, 2012 (77 FR 32075). The Service hosted an additional informational session and public hearing during this comment period on June 16, 2012, in Coolin, Idaho.

In acknowledgement of our responsibility to work directly with tribes, and to make information available regarding the proposed critical habitat designation, the Service met with the Kootenai Tribe of Idaho on January 9, 2012, in Bonners Ferry, Idaho, and participated on conference calls with the Kootenai Tribe of Idaho on May 24, 2012. The Service also discussed the proposal with the Kalispel Tribe of Indians on several occasions, including February 23, March 12, and April 26, 2012.

The Service also responded to several requests for public information and coordination meetings, including: (1) the Kootenai Valley Resource Initiative (KVRI) on January 9, 2012, in Bonners Ferry, Idaho; (2) the Bonner County Commissioners on January 24, February 28, March 26, and June 4, 2012, in Bonner County, Idaho; and (3) the Boundary County Commissioners on April 19, 2012, in Boundary County, Idaho.

During the first 60-day comment period, we received 172 comment letters addressing the proposed critical habitat designation. During the second 60-day comment period, we received an additional 118 comments from individuals or organizations, with an additional 37 written or oral comments provided at the April 28, 2012, public hearing in Bonner's Ferry, Idaho. During the third and final comment period, we received 10 comments on the proposal and the DEA, and testimony from 11 individuals at the public hearing.

During the public comments periods, comments were received from Federal, State, and local agencies, peer reviewers with scientific expertise, the Kootenai Tribe of Idaho, the Kalispel Tribe of Indians, the Canadian Government, private citizens, nongovernmental organizations, private companies, business owners, elected officials, recreational user groups, commercial and trade organizations, and others. Approximately 60 unique individual comments received were generally supportive of the proposed rule, while approximately 70 unique individual comments were in opposition to the proposed rule. Through campaigns sponsored by nongovernmental organizations, we received an additional 64,258 comments in support of the proposed designation consisting entirely of template letters.

The Service received many comments outside the scope of this rulemaking, including issues such as: (a) Threats to the species such as recreation, fires, and road building, management and control of predators and or prey species, previous actions taken by the Service to introduce or protect other listed species such as gray wolves (*Canis lupus*), grizzly bears (*Ursus arctos horribilis*), Canada lynx (*Lynx canadensis*), and others (see further discussion below); (b) strengths or weaknesses of the Endangered Species Act, and whether the Act should be changed or eliminated; (c) the taxonomic description of the southern Selkirk Mountains population of woodland caribou, its current listing status as an endangered species, and whether the population is extinct; (d) a recent petition received by the Service to delist the species; (e) addressing Highway 3 in Canada as a migration barrier; (f) hunting practices or regulations; and (g) that the proposed rule to designate critical habitat is in response to an ''agenda'' put forth by ''environmental groups.''

We received numerous comments specific to the threat of predation on the southern Selkirk Mountains population of woodland caribou, with many stating that gray wolves and other species such as grizzly bear, black bear (*Ursus americanus*), Canada lynx, and others are preying on caribou and should be managed. The Service acknowledges that predation is one of several important factors affecting this population of woodland caribou. In fact, predation is discussed frequently in the proposed rule, including under *Physical or Biological Features* (PBFs), where we described the need for: (1) Caribou to disperse in low numbers at high elevation; (2) large contiguous areas to avoid predators; and (3) female caribou to be able to access high-elevation alpine areas for calving, which are likely to be predator free. Predation is also addressed in the 1994 Recovery Plan (USFWS 1994) as a factor potentially affecting the status of the caribou population. Although addressing the threat of predation is outside of the scope of this rule, the Service agrees that successful caribou conservation and recovery efforts will need to address predation on the southern Selkirk Mountains population of woodland caribou, which will require effective coordination with other Federal and State agencies, the Coleville and Idaho Panhandle National Forests, tribes, and Canada.

Similarly, we received numerous comments regarding the effectiveness of past augmentation efforts to supplement the southern Selkirk Mountains population of woodland caribou, which were conducted by the Service, Canada, and State wildlife agencies. Efforts to augment the existing woodland caribou population with 103 animals from source herds in British Columbia between 1987 and 1990, and 1996 and 1998, have not resulted in a long-term improvement in caribou distribution throughout the southern Selkirk Mountains. A large number of the transplanted caribou died within the first year of augmentation, and there has been no long term increase in the population (USFWS 2008a). The number of woodland caribou detected in the United States has continued to dwindle, and annual census surveys continue to find the bulk of the remaining population occupying habitats in British Columbia. The most recent census information demonstrates a decline from 46 caribou in 2009 to 27 animals in 2012, although the cause of this decline has not been described (Degroot and Wakkinen 2012, p.2). The 2011 survey documented zero caribou in the United States, and the 2012 survey documented 4 caribou on Little Snowy Top Mountain, Idaho. No other tracks were observed in the United States (DeGroot and Wakkinen 2012, p. 5).

Although important and integral to the population's recovery, addressing threats such as predation, as well as efforts to stabilize or increase the southern Selkirk Mountains population of woodland caribou, are outside of the scope of this rulemaking. These issues will be addressed, as appropriate, within the scope of recovery actions for this species. For the purposes of this rulemaking, we are fully considering and responding to comments related to the proposed critical habitat designation and DEA. Although other comments are acknowledged and appreciated, we have not specifically responded to those that are outside of the scope of the proposed rule.

All substantive information provided during comment periods has either been incorporated directly into this final determination or addressed below. Comments received were grouped into 20 general issues specifically relating to the proposed critical habitat designation for the southern Selkirk Mountains population of woodland caribou, and are addressed in the following summary and incorporated into the final rule as appropriate.

Peer Review

In accordance with our policy published on July 1, 1994 (59 FR 34270), we solicited expert opinions from four knowledgeable individuals with scientific expertise that included familiarity with the species, the geographic region in which the species occurs, and conservation biology principles. We received responses from all four peer reviewers.

We reviewed all comments received from the peer reviewers for substantive issues and new information regarding critical habitat for the southern Selkirk Mountains population of woodland caribou. The peer reviewers had differing assessments of our methods and conclusions, and provided additional information, clarifications, and suggestions to improve the final critical habitat rule. Peer reviewer comments are addressed in the following summary and incorporated into the final rule as appropriate.

Peer Review Comments

(1) *Comment:* One peer reviewer commented that the proposed rule was very thorough and accurate, but the reviewer did not submit any additional comments. The three peer reviewers who did provide substantive comments stated that the entire area we proposed for designation as critical habitat was not likely occupied by the species at the time of listing, and stated that the February 29, 1984, final rule listing the species (49 FR 7390) did not define ''occupancy'', but rather identified a ''total approximate area of normal utilization'' within the conterminous United States (U.S.). These peer reviewers primarily point to aerial surveys and telemetry studies of radio-collared caribou at the time of listing (Scott and Servheen 1984) as the basis for their comment on occupancy. This study documented caribou primarily utilizing habitat in British Columbia, (B.C.), Canada, and those areas in the United States immediately adjacent to the international boundary with Canada. This was a comment also made by the State of Idaho, the Kootenai Tribe of Idaho, and numerous other public commenters.

Our Response: In developing our proposed critical habitat rule, we reviewed the final listing rule (49 FR 7390) to identify the specific areas within the geographical area occupied by the southern Selkirk Mountains population of woodland caribou at the time of listing. These areas also contained the physical or biological features essential to the conservation of these caribou, which may require special management considerations or protections, and therefore met the definition of critical habitat under section 3(5)(A) of the Act. Neither the January 14, 1983, emergency listing (48 FR 1722), nor the February 29, 1984, final listing rule (49 FR 7390), defined ''occupancy'', but these rules did refer to the ''approximate area of utilization'' (48 FR 1723), and ''area of normal utilization'' (49 FR 7390). We therefore equated ''occupancy at the time of listing'' with the ''approximate area of utilization'' and ''area of normal utilization'' in the proposed rule. However, comments submitted by the peer reviewers caused us to reexamine the basis of our analysis pertaining to the geographical area occupied by the species in 1983.

Scott and Servheen (1984, p. 16; 1985, p. 27), state the following in the background section of their job progress reports on caribou ecology: ''As the number of U.S. sightings declined since the early 1970's, concern has mounted that caribou may be abandoning the U.S. portion of their range.'' Scott and Servheen (1984, 1985, entire), conducted studies of radio-collared caribou to determine population numbers and composition, and helicopter surveys over significant areas of the Selkirk Mountains within the historic range of woodland caribou in an effort to: (1) Estimate the population size and sex/age composition; (2) determine mortality rates and causes; (3) determine reproductive rates and calving areas; (4) determine seasonal use areas; (5) identify seasonal and year-long habitat utilization patterns; (6) estimate seasonal caribou food habitat preferences; and (7) attempt to achieve a total count of the population. The helicopter surveys covered extensive areas of potential woodland caribou habitat within the Selkirk Mountains in Idaho and Washington (Scott and Servheen 1984, pp. 74–75). During their study, Scott and Servheen (1984, pp. 16–28) documented extensive use by caribou of habitat in Canada, with two bulls utilizing habitat near Little Snowy Top and Upper Hughes Ridge in Idaho and Sullivan Creek in Washington (p. 19). They did not document any caribou further south within Washington or Idaho during the course of the helicopter surveys. We are relying on Scott and Servheen survey results to determine occupancy at the time of listing, since the surveys were conducted during the timeframe in which the population was listed. Consequently, we have determined that the area generally depicted in Scott and Servheen (1984, p. 27), adjusted for

elevation and habitat based on the seasonal habitat suitability model developed by Kinley and Apps (2007, entire) for the southern Selkirk Mountains ecosystem, represents the best available scientific information regarding the geographical area occupied by the southern Selkirk Mountains population of woodland caribou at the time of listing. Based on the best available information, we are designating 30,010 ac (12,145 ha) of critical habitat for the southern Selkirk Mountains population of woodland caribou in the United States. These areas were known to be occupied at the time of listing in 1983 and 1984, they are essential to the conservation of the species, they require special management, and they therefore meet the definition of critical habitat under section 3(5)(A)(i) of the Act.

(2) *Comment:* One peer reviewer commented that the characterization of six seasonal habitats (early winter, late winter, spring, calving, summer, and fall) for the southern Selkirk Mountains population of woodland caribou in the proposed rule was inaccurate, as it is based on older scientific information, and suggested more recent scientific information describing caribou seasonal habitats based on distinct shifts in caribou elevation use is a more proper characterization of caribou seasonal habitats.

Our Response: We agree and have changed the seasonal definitions in the final rule to reflect the five seasonal definitions identified by Kinley and Apps (2007), which are: Early winter (October 17 to January 18), late winter (January 19 to April 19), spring (April 20 to July 7), calving (June 1 to July 7), and summer (July 8 to October 16).

(3) *Comment:* Two peer reviewers commented that the proposed rule inaccurately identifies early winter as the season during which caribou typically make the longest within-season (intra-seasonal) landscape movements. One peer reviewer noted that the stated range from several to 30 mi (48 km) of movement during the winter season in the proposed rule was inaccurate as well. Both reviewers referenced research conducted by Wakkinen and Slone (2010), which analyzed seasonal movement patterns of radio-collared caribou from 1988 to 2006, and found that caribou typically make the longest movements during spring and summer seasons. One peer reviewer noted that Wakkinen and Slone's (2010) analysis did not detect any difference in the median distance of movement by caribou between seasons (interseasonal).

Our Response: The identification of winter seasonal movement distances stated in the proposed rule was obtained from a USFS report (USFS 2004, p. 22), which used a compilation of historic and more recent anecdotal observations of caribou movements and radio-collared caribou to provide a range for caribou movements. Wakkinen and Slone's (2010) analysis, which is based on over 4,000 radio telemetry points obtained from 66 individual caribou over an 18-year period from 1988 to 2006, provided median values for intra- and interseasonal movements. As Wakkinen and Slone's (2010) report is more recent and is scientifically robust, we have incorporated their findings into the language of this final rule.

(4) *Comment:* One peer reviewer commented that the proposed rule's characterization of early and late winter habitats as being the most important habitats to caribou and the most limiting type of habitats on the landscape, is not supported by the science, as there is a high degree of overlap between the seasonal habitats. Given the high degree of overlap and importance of all seasonal habitats on the southern Selkirk Mountains population of woodland caribou recovery, it would be difficult to prioritize early and late winter habitats as having overriding importance to caribou or as being more limited on the landscape than are other seasonal habitats.

Our Response: We acknowledge that, from a purely geographical standpoint, Kinley and Apps (2007) habitat modeling demonstrated a high degree of overlap between caribou seasonal habitats, and that all seasonal habitats are important to caribou. From a physiological and nutritional standpoint, early and late winter seasonal habitat foraging opportunities can be restricted by snow conditions depending on the variability of snowpack in any given year, and therefore are generally less available than summer and spring habitats and foraging opportunities. During summer and spring seasons, the physical ability of caribou to move is much less restricted, and there is a wider assortment and more availability of foraging plants available to caribou. During early and late winter, snow conditions and depths restrict caribou movement and foraging opportunities. In late winter, caribou must subsist almost entirely upon arboreal lichens, which are typically provided by mature subalpine fir stands with appropriate moisture conditions. Additionally, winter conditions (cold temperatures, deep snow) impose high energetic costs to caribou. Thus, from a physiological and nutritional standpoint, early and late winter habitats are very important to caribou and may be more limited to caribou. However, notwithstanding the above discussion, we understand the importance of high-quality spring and summer forage habitat at contributing to the ability of female caribou to calve and support their calves or to enter the breeding season in good physiological condition to survive the harsh winter conditions.

(5) *Comment:* One peer reviewer commented that language in the proposed rule implying that the ecotone between the subalpine fir/Engelmann spruce and cedar/hemlock zone occurs at around 4,000 ft (1,220 m) in elevation is inaccurate, and that the ecotone actually occurs approximately between the elevational band of 4,900 and 5,000 ft (1,490 and 1,520 m) (*i.e.,* a 100-foot elevational band ecotone).

Our Response: We agree, and we have provided the following clarification to that portion of the Primary Constituent Elements (PCE) in this final designation. According to Art Zack (USFS, pers. comm. 2012): ''In the Selkirk ecosystem, the average boundary between cedar/hemlock Vegetation Response Units (VRU) groups and subalpine fir VRU groups (or habitat type groups) is approximately 5,100 ft (1,550 m) elevation. However, this break will vary from place to place based on aspect, topography, landform, cold air drainage patterns, and local weather patterns. Based on a sample of 100 points on the break between these 2 groups, the standard deviation of this variation in the elevation break between these 2 categories was approximately 300 ft (90 m) in elevation. In very limited circumstances, lower elevation drainage bottoms that are below a high ridge and that have restricted cold air drainage out of the valley bottom, may have subalpine fir habitat types over 1,000 ft (30 m) lower in elevation than the normal boundary. However, these are very restricted geographically, and are typically linear features confined to the very lower valley bottom. Where two different VRU's or habitat type groups meet, it is often not a distinct hard line between the two types, but rather an ecotone where the two types gradually intergrade. On average, the estimated ecotone width between the subalpine fir habitat types and the lower elevation habitat type may be 200 ft (61 m) in elevation. However that ecotone width varies depending upon local environmental characteristics.''

(6) *Comment:* One peer reviewer noted that our definition of calving habitat in the proposed rule as comprising high-elevation, old-growth

forest ridgetops was too narrow and should also include high elevation alpine and non-forested areas in close proximity to forested mature and old-growth ridge tops as well as high elevation basins. The peer reviewer pointed to research demonstrating that caribou in the Selkirk Mountains use alpine scree sites as well as exposed cliff faces (Warren 1990; Allen 1998), and noted that the broader definition of calving habitat is supported by the analysis conducted by Kinley and Apps (2007), who demonstrated that pregnant females showed a preference for alpine at all scales and that, at the finest scale, caribou did not avoid non-forested conditions.

Our Response: We agree, and we have provided clarification to that portion of the PCE to identify that calving habitat includes more areas such as high-elevation basins in this final critical habitat designation.

(7) *Comment:* Two peer reviewers commented that the proposed rule's characterization of caribou movements during the spring and summer was inaccurate. Language in the proposed rule stated that during the spring and summer caribou move to lower elevations to forage on grasses, flowering plants, horsetails, willow and dwarf birch leaves and tips, sedges, and lichens in subalpine meadows (Paquet 1997, pp. 13, 16). The peer reviewers noted that Paquet (1997) also stated, ''in summer, mountain caribou move back to mid- and upper elevation spruce/alpine fir forests.''

Our Response: We agree, and we have provided language clarifying the discussion of summer and spring caribou movements in this final critical habitat designation.

(8) *Comment:* One peer reviewer commented that caribou spring habitat findings reported in Kinley and Apps (2007) conflicts with the spring habitat discussion in the proposed rule, which is based on the 1994 Recovery Plan (USFWS 1994), and Scott and Servheen's (1985) and Servheen and Lyon's (1989) research. The proposed rule stated that in spring caribou move to areas with green vegetation, and that these areas may overlap with early and late winter ranges at mid to lower elevations. The peer reviewer stated that Kinley and App's (2007) finding that caribou select for open-canopied stands of older subalpine fir/spruce habitats with high solar insolation at all scales with use of alpine and nonforested areas at broad scales only, conflicts with Scott and Servheen's (1985) research as it is referenced in the proposed rule.

Our Response: We do not interpret Kinley and App's (2007) findings as being in disagreement with our statement in the proposed rule that caribou will seek out areas with green vegetation in spring. We stated previously that there is a high degree of overlap between seasonal habitats, and caribou will seek out green vegetation in the spring regardless of whether it occurs in sivilculturally treated (*i.e.,* partial cut, clear-cut, seed/sapling) stands, natural openings within the forest canopy, or open-canopied stands.

(9) *Comment:* One peer reviewer stated the proposed rule incorrectly cited Stevenson *et al.* (2001) and Kinley and Apps (2007), as referring to western hemlock/western red cedar forests providing summer range for the southern Selkirk Mountains population of woodland caribou. Another peer reviewer commented that the proposed rule's description of summer habitat should also identify the importance and use of permanent lakes, bogs, and fens by caribou for feeding and bedding sites in the summer and fall months, as documented through research conducted by Freddy 1974; Johnson *et al.* 1977 and 1980; Warren 1990; and Allen 1998. One peer reviewer commented that the proposed rule's use of fall habitat to characterize seasonal habitat for caribou is inconsistent with the seasonal habitat definitions in Kinley and Apps (2007), which is considered to provide the best available scientific information on habitat and seasons of use by the southern Selkirk Mountains woodland caribou.

Our Response: We have corrected and clarified this statement in this final critical habitat designation to reflect that subalpine fir and spruce forests provide summer range for the southern Selkirk Mountains population of woodland caribou. We have removed the reference to hemlock/western red cedar forests as providing summer habitat. The final designation reflects that subalpine fir and spruce fir forests provide summer range for this species. Relative to the description of summer and fall habitat, we have expanded this description in this final designation. Regarding reference to fall habitats, as noted previously in our response to Comment 2, we have revised the seasonal habitat definitions in this final designation to be consistent with Kinley and Apps (2007).

(10) *Comment:* Two peer reviewers acknowledge that the proposed rule correctly identifies travel corridors as important habitat features supporting connectivity of seasonal caribou habitats. Both reviewers, however, suggested the travel corridor discussion in the proposed rule could be refined through more comprehensive consideration and interpretation of the available scientific information. One reviewer noted that Freddy (1974) identified specific routes in British Columbia that the southern Selkirk Mountains population of woodland caribou used repeatedly, which were natural passes along ridges, stream bottoms, forested areas, and areas connecting feeding and resting areas. The reviewer also noted that Freddy (1974) identified caribou movement from Kootenay Pass, British Columbia southward to Snowy Top Mountain, and from Monk Creek and Nun Creek, British Columbia to Continental Mountain via the Upper Priest River/American Falls drainage. Both reviewers noted that Wakkinen and Slone (2010) modeled travel corridors between areas of high- quality caribou habitat utilizing habitat quality maps developed by Kinley and Apps (2007).

Our Response: The southern Selkirk Mountains population of woodland caribou is a transboundary species that travels between British Columbia and the United States. We acknowledge the importance of maintaining habitat connectivity between British Columbia and the United States, and although we do not designate critical habitat in foreign countries, we have included a travel corridor modeled by Wakkinen and Slone (2010) that facilitates caribou movement between patches of high-quality habitat in the Unites States including Little Snowy Top Mountain in Idaho, and the Salmo Priest Wilderness in Washington, and connects with the Stagleap Provincial Park in British Columbia.

(11) *Comment:* One peer reviewer provided several scientific citations (Freddy 1974; Scott and Servheen 1985; Rominger and Oldemeyer 1989; Warren *et al.* 1996; and Allen 1998), and suggested the available science on the southern Selkirk Mountains population of woodland caribou indicates the appropriate elevation cutoff to identify critical early-winter habitat for this population is 4,500 ft (1,372 m).

Our Response: We agree that these citations provide additional scientific information in conjunction with other scientific literature, as well as peer review and substantive public comments, to determine the appropriate critical habitat elevation boundaries. However, there is a lot of uncertainty in making a designation of an ''absolute'' elevational point with which to designate critical habitat for a species such as the southern Selkirk Mountains population of caribou. Literature and information we reviewed, (such as Scott and Servheen 1984, 1985; MCTAC 2002; McKinley and Apps 2007; Wakkinen

and Slone 2010), and additional peer reviewer comments, indicate that although caribou have been known to use elevations below 5,000 ft (1,520 m), only habitats at 5,000 ft (1,520 m) in elevation and above are essential to caribou. The final critical habitat designation includes areas at 5,000 ft (1,520 m) and higher in elevation, based on the best available scientific information (see ''*Criteria Used To Identify Critical Habitat''*).

(12) *Comment:* One peer reviewer suggested the proposed rule lacked a complete discussion on potential sources of disturbance to the southern Selkirk Mountains population of woodland caribou. The reviewer suggested that other forms of human-caused disturbance during nonwinter months, in addition to snowmobiling impacts during winter, may be an important consideration in the conservation of caribou. Specifically, the reviewer stated ''* * * high elevation basins that include meadows and riparian areas are preferred habitat by woodland caribou. Such areas are often snow-free earlier in the season, provide good visibility, and include an abundance of arboreal lichen, grasses, and forbs. This makes them ideal habitat for caribou in general, and especially cows with calves. These areas also provide some of the most popular recreation destinations for backpacking, hiking and camping from July through October, with significantly increasing human use observed over the last two decades due to publicity from local advertisement and guide books.'' The reviewer also noted that the Service's 2001 Amended Biological Opinion for the continued implementation of the Idaho Panhandle National Forests (IPNF) Land and Resource Management Plan (LRMP) stated that increasing pressure during both winter and summer was decreasing habitat effectiveness for caribou (USFWS 2001, p. 17). The reviewer noted that several scientific documents support this presumption: Allen (1998) and Warren (1990) made field observations of transplanted caribou; Dumont (1993) concluded that interactions between caribou and hikers on preferred summer range likely increased caribou susceptibility to predation by pushing caribou into areas of reduced visibility; and Wittmer (2005), Compton *et al.* (1995), and Wakkinen and Johnson (2000) noted caribou are most susceptible to mortality from predation during the summer months.

Our Response: We appreciate the additional information provided to us by the peer reviewer. Although the intent of the proposed rule, as well as the final rule, is not to describe the threats to the southern Selkirk Mountains population of woodland caribou in a comprehensive manner, we have expanded our discussion to include other recreational forms of potential displacement and disturbance of caribou in the *Physical or Biological Feature* discussion within ''Habitats That Are Protected From Disturbance or Are Representative of the Historical, Geographical, and Ecological Distributions of a Species'' portion of this final critical habitat designation.

(13) *Comment:* One peer reviewer questioned the proposed rule's statement that the ongoing loss and fragmentation of contiguous old-growth forests and forest habitat on National Forest System (NFS) lands within the caribou recovery zone is a result of a combination of timber harvest, road development, and wildfires. The reviewer stated that, due to a variety of policy and management decisions (*e.g.,* grizzly bear management guidelines, woodland caribou management guidelines), timber harvest on NFS lands within the caribou recovery zone is virtually nonexistent, and many roads have been decommissioned. Therefore, fragmentation and loss of caribou habitat within the caribou recovery zone on NFS lands due to timber harvesting and road construction has been greatly reduced over historical conditions. The reviewer also commented that the proposed rule failed to adequately consider the role that natural wildfire plays within this ecosystem as an agent of change and resetting natural succession on the landscape, because language in the proposed rule advocates the development of management actions to minimize the potential for wildfire, and the implementation of rapid response measures when wildfire occurs. The reviewer noted that wildfire is a natural disturbance agent within this ecosystem, which facilitates the development and maintenance of habitat for other listed species (*e.g.,* grizzly bear and white bark pine (*Pinus albicaulis*)), and that historical and recent fire suppression management actions and policies have adversely affected these species. Additionally, the reviewer commented that landscape analyses of changes in vegetation over time demonstrate an increase and/or maintenance in the amount and distribution of large-size classes of subalpine fir and moist, mixed-conifer (cedar, hemlock, grand fir, and larch forest), indicating a pattern ecosystem recovery from the large 1880 to 1890 and 1910 to 1946 wildfires that impacted caribou habitat.

Our Response: We acknowledge that implementation of southern Selkirk Mountains population of woodland caribou management standards and guidelines, grizzly bear access management standards and guidelines, as well as other management decisions, such as the 2008 Modified Idaho Roadless Rule and 2007 Northern Rockies Lynx Amendment, have reduced loss and fragmentation of old-growth forests on NFS lands within the area that was proposed for designation as critical habitat, over historical conditions. Implementation of these management decisions have and will continue to benefit caribou and caribou habitat. However, these management decisions do not prevent road construction or timber harvest (including old-growth forests) within the areas being designated as critical habitat under all circumstances. Thus, continued loss and fragmentation of caribou habitat (including old-growth forests) in an ecosystem that has been significantly altered from historical forest conditions continues to be a primary long-term threat to caribou. We agree that many acres of spruce/fir and cedar/hemlock forests that were set back to an early successional stage by large, historical, stand-replacement fires are in various stages of developing tree species and stand structure characteristics that are representative of late-successional spruce/fir and cedar hemlock forests through natural successional processes. Nonetheless, we acknowledge that natural wildfire plays an important role in maintaining a mosaic of forest successional stages that provides habitat for a variety of species endemic to this ecosystem, and that fire suppression can alter vegetative mosaics and species composition. Therefore, in this critical habitat designation we have incorporated language addressing the importance of developing and implementing a wildland fire use plan to allow for the nonsuppression of naturally ignited fires when appropriate, and the implementation of a prescribed fire program.

Comments From States

Section 4(i) of the Act states, ''the Secretary shall submit to the State agency a written justification for his failure to adopt regulations consistent with the agency's comments or petition.'' Comments received from the State of Idaho regarding the proposal to designate critical habitat for the southern Selkirk Mountains population of woodland caribou are addressed below.

(14) *Comment:* The State of Idaho questioned the appropriateness of

designating critical habitat based on a lower elevation of 4,000 ft (1,219 m), stating that caribou seldom use areas as low as this elevation. The State of Idaho referred to studies that report mean elevation use for caribou in the south Selkirk Mountains to be approximately 5,500 ft (1,675 m).

Our Response: We received numerous comments in addition to the State of Idaho regarding the science we used and synthesized to develop the proposed designation. We utilized all substantive input from these commenters in refining the designation (including the appropriate elevation boundary) of critical habitat for the southern Selkirk Mountains population of woodland caribou in this final rule. The elevations that were identified in the proposed rule have been revised in this final rule (see Primary Constituent Elements for the Southern Selkirk Mountains Population of Woodland Caribou, below). Literature and information we have since reviewed, such as Scott and Servheen 1984, 1985; MCTAC 2002; McKinley and Apps 2007; and Wakkinen and Slone 2010, as well as additional peer review comments, indicate that although caribou have been known to use elevations below 5,000 ft (1,520 m), only habitats at 5,000 ft (1,520 m) in elevation and above are essential to caribou. The final designation includes areas at 5,000 ft (1,520 m) and higher in elevation, based on the best available scientific information.

(15) *Comment:* The State of Idaho noted that forest practices such as partial cutting at higher elevations is common on Idaho managed lands, in reference to a statement in the proposed rule (76 FR 74025) that in the last decade, timber harvest has moved into high-elevation mature and old-growth habitat types due to more roads and more powerful machinery capable of traversing difficult terrains (Stevenson *et al.* 2001, p. 10). The State commented that during the two previous decades, Idaho Department of Lands foresters have not noted trends toward more powerful machinery capable of traversing difficult terrain, and that State timber sale contracts generally impose size limits on equipment, thereby eliminating the most powerful tractors and skidders from operating on State timber sales. The State commented that a trend toward more mechanized felling and harvesting equipment is evident; however, ground capabilities have remained largely unchanged.

Our Response: There are no State of Idaho lands being designated as critical habitat. We also acknowledge that, depending on the scale and timing of implementation, and equipment limitations, certain timber harvest treatments (partial cuts, thinning, etc.), may result in benign or perhaps beneficial effects to caribou habitat. However, as implemented historically, timber harvest practices (*e.g.,* large clear cuts) were not compatible with maintaining caribou habitat. To the extent these same types of timber harvests would be implemented today, such treatments would similarly be incompatible with the habitat requirements of caribou.

(16) *Comment:* The State and many other commenters have pointed out that recent annual surveys for the southern Selkirk Mountains population of woodland caribou have sighted zero to four caribou south of the United States-Canada border.

Our Response: See our response to Comment 1, which discusses the issue of occupancy at the time of listing. As noted previously, the southern Selkirk Mountains population of woodland caribou is a transboundary population, which moves between B.C., Canada and the United States. Although most of this population is known to inhabit Canada, individual caribou freely move between Canada and the United States. We are designating approximately 30,010 ac (12,145 ha) in one unit containing Boundary County, Idaho, and Pend Oreille County, Washington, as critical habitat for the southern Selkirk Mountains population of woodland caribou. This designation represents a reduction of approximately 345,552 ac (139,840 ha) from the critical habitat originally proposed for designation (76 FR 74018, November 30, 2011); and reflects a 1,000-ft (about 300-m) change in elevation from 4,000 ft (1,220 m) in the proposed rule, to an elevation at or above 5,000 ft (1,520 m) in the final critical habitat designation. Factors that were considered and influenced this change from the proposed rule included: (1) A revised determination of the geographical area occupied by the southern Selkirk Mountains population of woodland caribou at the time of listing based on peer review comments, Scott and Servheen (1984, 1985), as well as census monitoring documenting low numbers of individual caribou observed in the United States during those annual surveys, and (2) information and literature reporting the overall decline of the subspecies mountain caribou (*Rangifer tarandus caribou*) across its range, and in particular the decline of woodland caribou populations in the southern extent of their range, including the southern Selkirk Mountains population of woodland caribou.

(17) *Comment:* The State of Idaho indicated that the Service failed to take into account the best available science, and instead took a broad-brushed approach that if implemented as written, would carry significant economic consequences and ultimately hinder recovery efforts for the southern Selkirk Mountains population of woodland caribou in the region. The Kootenai Tribe of Idaho expressed a similar concern. The Idaho Department of Fish and Game (IDFG) did not support the proposed critical habitat designation being based on recovery zone boundaries, stating that much of the recovery zone would not be suitable caribou habitat for a century or more due to large stand-replacing fires in the 1960s, and to some extent, timber harvest. The Idaho Department of Lands (IDL) recommended that the approach and the area proposed for critical habitat be reevaluated and reduced significantly using data relevant to Idaho and with input from IDL and other State agencies.

Our Response: We have reviewed and evaluated all comments and information provided to the Service, including the State of Idaho's comments on the proposed rule and DEA. We have used that information to inform the final designation of critical habitat for the southern Selkirk Mountains population of woodland caribou. Although not all of the information received through public comment is specifically identified or reflected in our response to comments in this final rule, it is part of the administrative record for this rulemaking, and has been given appropriate weight in the final designation. In accordance with section 4(b)(2) of the Act, we used the best scientific data available to inform this critical habitat designation. We also complied with the criteria, established procedures, and guidance based on the Policy on Information Standards under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658)), and our associated Information Quality Guidelines.

In making this final designation of critical habitat for the southern Selkirk Mountains population of woodland caribou, we reviewed information from many different sources, including articles in peer-reviewed journals, scientific status surveys and studies, unpublished materials, and experts' opinions or personal knowledge, to inform the final critical habitat designation. We requested comments or information from other concerned governmental agencies, the scientific community, industry, and other

interested parties concerning the proposed rule. Also, in accordance with our peer review policy published on July 1, 1994 (59 FR 34270), we solicited expert opinions from knowledgeable individuals with scientific expertise that included familiarity with the species, the geographic region in which the species occurs, and conservation biology principles. All of the comments and information we received were fully considered in finalizing this critical habitat designation for the southern Selkirk Mountains population of woodland caribou. The Summary of Changes From Proposed Rule section identifies the revisions being made in this final designation, which include removing areas that were similar to the southern Selkirk Mountains woodland caribou recovery zone boundaries, after considering recommendations from the State of Idaho (including IDFG), the Kootenai Tribe of Idaho, and peer reviewers. All the supporting materials used for the final rule, including literature cited and comments from the public and peer reviewers, are available for public inspection at the Web site: *http://www.regulations.gov.*

The State's comments with regard to economic impacts are addressed in the ''Comments Related to the Economic Analysis'' section below.

(18) *Comment:* The State of Idaho disagrees that the entire area proposed for critical habitat was occupied at the time of listing, when census data collected by the IDFG at the time of listing indicates that the southern Selkirk Mountains woodland caribou were utilizing habitat found in close proximity to the U.S. and Canadian border.

Our Response: Our final designation of critical habitat for the southern Selkirk Mountains population of woodland caribou reflects our analysis of the best available scientific information, and peer review comments provided to us during public comment. See also our response to Comment 1 and the Summary of Changes from Proposed Rule section for a more robust discussion of occupancy at the time of listing and changes between the proposed and final critical habitat rules.

(19) *Comment:* The State of Idaho stated that critical habitat designation is not prudent at this time, because designation may lead to increased animosity towards the species and adequate protections are in place for the species and its habitat, including section 9 of the Act, which makes it unlawful for anyone to ''take'' southern Selkirk Mountains population of woodland caribou animals given its endangered status.

Our Response: We recognize and appreciate the conservation efforts that have been implemented for the southern Selkirk Mountains population of woodland caribou, and look forward to continuing this important work with our partners. However, to the maximum extent prudent, the designation of critical habitat is required when a species is listed as endangered or threatened under section 4(a)(3)(A)(i) of the Act. Critical habitat designation is a regulatory action that defines specific areas that are essential to the conservation of the species in accordance with the statutory definition. We find the contiguous habitat proposed in this final rule provides the Primary Constituent Elements (PCEs) essential for the conservation of caribou (see Criteria Used to Identify Critical Habitat for more information), and therefore we conclude that designation is beneficial to this species. We have reviewed the best available information and have determined that the designation of critical habitat for the southern Selkirk Mountains population of woodland caribou would not be expected to increase the degree of threat by poaching, since increased education and awareness have made illegal poaching less of a threat than at the time of listing. Based on this information, we have determined that the designation of critical habitat is prudent. The fact that take prohibitions already exist under section 9 of the Act exist does not negate our requirement to designate critical habitat under section 4(a)(3) of the Act. Please refer to the Prudency Determination section in the proposed rule (76 FR 7401; November 30, 2011), for further information on our critical habitat prudency determination.

(20) *Comment:* The State of Idaho (IDFG) requested information on what additional, if any, management actions would be imposed in areas where critical habitat is designated, and how they would benefit the southern Selkirk Mountains population of woodland caribou.

Our Response: We do not foresee or anticipate substantive changes in the existing management of the southern Selkirk Mountains population of woodland caribou or its habitat, because Federal agencies that manage land within the critical habitat area already take extensive measures to protect caribou in these areas. We anticipate that these actions are likely to continue, and will continue to be subject to section 7 consultation as appropriate, regardless of critical habitat designation. See our response to Comment 21 for an additional discussion on the relationship between critical habitat and land use.

(21) *Comment:* The State of Idaho Department of Parks and Recreation (IDPR) is concerned that critical habitat management restrictions will have an effect on recreational activities, particularly snowmobiling, and motorized vehicle restrictions on roads and trails. The State commented that the Selkirk Mountains provide the only open terrain for snowmobiling in north Idaho. The State provided statistics showing a continual decline in motorized recreation opportunities in the Idaho Panhandle National Forest (IPNF), primarily restrictions associated with the grizzly bear recovery zone. Numerous public comments were received identifying similar concerns as the State.

Our Response: We have no information that would indicate that a possible outcome of a section 7 consultation with a Federal agency from designation of critical habitat would result in closures of public access, or result in restrictions to currently permissible activities such as recreation on Federal, State, county, or private lands. This is because designation of critical habitat does not affect land ownership, or establish any closures, or restrictions on use of or access to the designated areas. Critical habitat designation also does not establish specific land management standards or prescriptions, although Federal agencies are prohibited from carrying out, funding, or authorizing actions that would destroy or adversely modify critical habitat. The Service acknowledges that some seasonal limitations on motorized vehicle access to public lands have occurred to minimize disturbance to caribou, including a 1994 closure for a large area of the Selkirk Crest on the IPNF. This closure was put in place to protect caribou from impacts related to snowmobiling, in coordination with the IDFG. Additionally, we understand that a court-ordered injunction in 2006, which was modified in 2007, has restricted much of the area used by caribou within the Selkirk Crest from snowmobiling, until the IPNF develops a winter recreation strategy addressing the effects of snowmobiling upon the species. However, the critical habitat designation for the southern Selkirk Mountains population of woodland caribou has no bearing on either the 1994 closure or the 2006/2007 court-ordered injunction. The Service will work closely with the IPNF on the development of their winter recreation strategy, which will be subject to section 7 consultation with the Service.

Comments From Native American Tribes

(22) *Comment:* The Kalispel Tribe of Indians stated that the recovery of the southern Selkirk Mountains population of woodland caribou is of critical importance to the tribe. The tribe views this population as nearly extinct, and supports the development and execution of an ambitious plan in order to further recovery, including implementation of all tools available under the Act.

Our Response: We appreciate the significant interest and active involvement of the Kalispel Tribe of Indians in the recovery of the southern Selkirk Mountains population of woodland caribou. The designation of critical habitat is one tool the Service uses to recover species, and we look forward to continued work with the tribe toward that objective.

(23) *Comment:* The Kalispel Tribe of Indians stated that through critical habitat designation or an update of the recovery plan, the following issues must be addressed: (1) A full habitat analysis of the 375,562-acre recovery area must be performed in order to develop an adequate management plan; (2) based on current and predicted use areas, an active predator control plan must be implemented; and (3) a winter use plan for the recovery area must be developed, adopted, and strictly enforced. The tribe also stated that while they understand the importance of both balancing predator-prey relationships and the desire for accessing remote areas for recreation, neither disturbance is acceptable until caribou populations rebound. They stated that once the above three conditions are met, the herd should be augmented with new animals from Canada to bolster the vitality of the existing herd.

Our Response: We appreciate the tribe's comments on the proposed rule for the designation of critical habitat for the southern Selkirk Mountains population of woodland caribou. We have reevaluated the best available data and the information provided in the 1994 Recovery Plan for the Selkirk Mountain Woodland Caribou, in light of the results of population surveys that have been conducted since the time of listing under the Act. As a result, we are designating 30,011 ac (12,145 ha) at an elevation of 5,000 ft (1,520 m) and above, on Federal lands in Boundary County, Idaho, and Pend Oreille County, Washington, as critical habitat for the southern Selkirk Mountains population of woodland caribou in the United States. This area represents our best assessment of the area occupied by the species at the time of listing in 1983, and that provides the PBFs essential to the conservation of the species in the United States. This area, when combined with areas secured and protected for the conservation of the species in British Columbia, (see ''Summary of Changes from Proposed Rule'') meets the recovery area requirements recommended in the 1994 recovery plan. The Service supports and agrees that effectively addressing the threats to the species, including predation and disturbance from recreational activities, will be essential to recover this species.

(24) *Comment:* In a letter to the Service on January 10, 2012, the Kootenai Tribe of Idaho stated that the proposed critical habitat area is in Kootenai Aboriginal Territory and holds special significance to the tribe. The Kootenai Tribe stated that they are pleased to be able to work with the Service on a government-to-government level in order to ensure protection and enhancement of the tribe's treaty resources, and look forward to consultation during and after the public comment period. The tribe urged the Service to consider community concerns about the proposed critical habitat designation and to extend the public comment period.

Our Response: We appreciate knowing the proposed critical habitat area holds special significance to the Kootenai Tribe of Idaho. We coordinated with the Kootenai Tribe throughout the critical habitat designation process, and look forward to continuing this cooperative relationship beyond the confines of this rulemaking. As noted earlier, the Service extended the public comment on several occasions to ensure our determination was based on the best available information and had the benefit of input from stakeholders on all sides of the issue. We also held numerous public meetings and conducted two public hearings to increase communication and address concerns.

(25) *Comment:* In a letter to the Service on May 15, 2012, the Kootenai Tribe of Idaho stated that the proposed critical habitat rule ''ignores the Federal government's commitments to consult meaningfully with the federally recognized tribes by attempting to limit such consultation to issues affecting Tribal lands.'' The tribe stated that the Service failed to acknowledge its responsibilities to protect and enhance the Kootenai Tribe's Treaty-reserved rights to fish at usual and accustomed areas, and hunt and gather on open and unclaimed lands, and protect cultural resources and access to traditional cultural properties and spiritual sites.

Our Response: The Service values its government-to-government relationship with the Kootenai Tribe of Idaho, and greatly appreciated the formal and informal exchange of information on the proposed critical habitat designation, on January 9, 2012, in Bonners Ferry, Idaho, and during a conference call on May 24, 2012, to clarify the concerns expressed in the tribe's letter. In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal tribes on a government-to-government basis. This government-to-government relationship, as outlined in Secretarial Order 3206, dated June 5, 1997, establishes several important principles, including: (1) Working directly with tribes to promote healthy ecosystems; (2) recognizing that Indian lands are not subject to the same control as Federal public lands; (3) assisting tribes in developing and expanding tribal programs to promote healthy ecosystems; (4) supporting tribal measures that preclude the need for conservation restrictions; (5) being sensitive to Indian culture, religion, and spirituality; (6) exchanging information regarding tribal trust resources; and (7) striving to protect sensitive tribal information from disclosure.

(26) *Comment:* The Kootenai Tribe of Idaho questioned the prudency determination made by the Service because they believe the Service has not done the following: (1) Increased education and awareness regarding caribou among communities in north Idaho; (2) provided evidence that the threat of poaching may be reduced; or (3) addressed the second prudency criteria in order to demonstrate a benefit in designating critical habitat for the southern Selkirk Mountains population of woodland caribou. The Service also received questions regarding the prudency of the proposed critical habitat designation from the State of Idaho, private industry, and public commenters.

Our Response: See also our response to the State of Idaho in Comments 1 and 19. There is no requirement under the Act to demonstrate an increase in public education and awareness with respect to a prudency determination. However, we welcome all opportunities to further

public education and awareness, since engaging local communities in a collaborative way is critical to recovering imperiled species. The 5-year status review for the southern Selkirk Mountains population of woodland caribou states that, historically, over-hunting contributed to the decline of some caribou populations. However, there is no legal hunting season on the southern Selkirk Mountains population of woodland caribou in British Columbia or the United States, although poaching by ''mistaken identity'' shootings may occur. Based on the best available information, we do not expect poaching to significantly affect the southern Selkirk Mountains population of woodland caribou (USFWS 2008a, p 23).

(27) *Comment:* The Kootenai Tribe of Idaho commented that the recovery planning effort must be restarted and include all appropriate Tribal representatives, including Kootenai Tribe of Idaho representatives. In so doing, the sovereign governments responsible for caribou recovery can better understand the limiting factors impeding woodland caribou recovery and develop approaches for addressing those limiting factors in a holistic and ecosystem-based manner. They stated that the recovery effort must be transparent, and that communities affected, Kootenai and non-Kootenai, are entitled to know why the government is taking these actions, how such actions lead to achievable goals, and what it means for their livelihoods and ways of life. Numerous commenters stated that efforts to recover caribou have not been successful and questioned the need to continue recovery efforts. Others recommended that the Service consider revising the recovery plan, including the need to create additional populations to achieve recovery of the species.

Our Response: Although the status of the southern Selkirk Mountains population of woodland caribou recovery plan is beyond the scope of this rule, section 4(f)(4) of the Act states that the Secretary shall, prior to final approval of a new or revised recovery plan, provide public notice and an opportunity for public review and comment on such plan, and shall consider all information presented during the public comment period. Any successful recovery planning effort will require input and participation by appropriate Federal, State, Tribal, local, and private stakeholders, to identify measures needed to conserve any species listed under the Act.

(28) *Comment:* The Kootenai Tribe of Idaho recommended that: (1) The analysis of the IPNF suitable habitat should focus on critical caribou habitat essential to the conservation of the species; (2) reducing constraints on forest management and over-the-snow recreation should be factors considered; and (3) reduced constraints on forest management would assist not only in increasing community support for caribou recovery, but also allow for forest management to improve caribou habitat in areas not currently occupied by caribou, but which may support caribou populations in the future.

Our Response: We appreciate the Kootenai Tribe of Idaho's concerns and desire to achieve conservation and recovery of the southern Selkirk Mountains population of woodland caribou. With regard to recommendation (1), the proposed critical habitat rule was focused on caribou habitat essential to the conservation of the species, as required under section 3(5)(A) of the Act. With regard to recommendation (2), the designation of critical habitat does not establish specific land management standards or prescriptions, and does not automatically close areas to public access or currently permissible activities, such as recreation, or restrict all uses of land. However, as a result of critical habitat designation, Federal agencies are required under section 7(a)(2) of the Act to consult with the Service on Federal actions that may affect critical habitat. Federal agencies are prohibited from carrying out, funding, or authorizing actions that would destroy or adversely modify critical habitat. During the consultation process, if we conclude that a proposed action is likely to result in the destruction or adverse modification of critical habitat, we are required to provide the Federal agency with a biological opinion describing reasonable and prudent alternatives to the action that would avoid the destruction or adverse modification of critical habitat. Such alternatives must be economically, as well as technologically, feasible (50 CFR 402.02).

However, regardless of critical habitat designation, Federal agencies already consult with the Service under section 7 of the Act because the southern Selkirk Mountains population of woodland caribou is a listed species under the Act. Federal agencies, such as the USFS, will continue to consult with us regardless of the designation of critical habitat, in order to ensure that their actions do not jeopardize the continued existence of caribou. In addition, Federal agencies that manage land within the proposed critical habitat already have ongoing management activities that consider the caribou, and various conservation efforts are in place to benefit the caribou. These plans have existed and will exist in the future with or without the designation of critical habitat, and the Service does not anticipate any additional ''constraints'' on management activities within National Forest lands. The Service acknowledges that some seasonal limitations on motorized vehicle access to public lands have occurred to minimize disturbance to caribou, including a 1994 closure for a large area of the Selkirk Crest in the IPNF. However, in the Service's analysis of the proposal, we stated that we do not foresee or anticipate that areas not currently closed due to the listing of caribou will be closed with the designation of critical habitat. This is because Federal agencies that manage land within the proposed critical habitat area already take extensive measures to protect the caribou within, and these actions have and will continue to be carried out and consulted on regardless of critical habitat designation. With regard to concern (3), the Service will work with Federal agencies through the section 7 consultation process, as well as other Federal, State, tribal, and private partners through the recovery planning process, to incorporate the best available science when developing appropriate management and recovery actions for caribou.

Comments From Environment Canada

(29) *Comment:* Environment Canada's Canadian Wildlife Service provided comments in support of the proposed critical habitat designation and advised us that they recently initiated the preparation of a draft recovery strategy for Woodland Caribou, Southern Mountain population. The draft recovery strategy covers many populations, including the transboundary southern Selkirk Mountains population of woodland caribou. The Canadian Wildlife Service stated that they recognize the detailed implementation planning and actions initiated by government agencies including the Service and that this information, along with additional information, will be considered in preparation of the Canadian recovery strategy. The Canadian Wildlife Service welcomes any contribution to the recovery strategy that the Service wishes to make.

Our Response: We appreciate the support provided by the Canadian Wildlife Service during this critical habitat designation process and during past caribou transplant and augmentation efforts. We also acknowledge the recent and ongoing

conservation actions undertaken by Canada, such as protecting Crown Lands from timber harvest within the Selkirk Mountains. We look forward to participating in the development of the draft recovery strategy as it pertains to the southern Selkirk Mountains population of woodland caribou.

Public Comments

(30) *Comment:* Several commenters requested that the Service hold public meetings within the communities affected by the proposed critical habitat designation and notify the media of these meetings. One commenter suggested that a public hearing be held in Bonners Ferry, ID. One organization suggested the Service should have held public meetings in additional locations close to the Selkirk Mountains, such as Sandpoint, ID, and Spokane, WA. One commenter requested that we engage with the Kootenai Tribe of Idaho and any other tribal/indigenous groups in the area affected by the proposed critical habitat designation.

Our Response: During the rulemaking process, the Service conducted numerous outreach efforts to be responsive to public requests for additional information, including the following:

- January 9, 2012: We met with the Kootenai Tribe of Idaho.
- May 24, 2012: We held a follow-up conference call with members of the tribe to discuss the proposed critical habitat rule.
- January 9, 2012: We presented information on the proposed critical habitat designation at a meeting of the Kootenai Valley Resource Initiative (KVRI) in Bonners Ferry, Boundary County, Idaho.
- January 24, 2012; February 28, 2012; March 26, 2012; June 24, 2012: We participated in public information and coordination meetings in Bonner County, Idaho, at the request of Bonner County Commissioners.
- April 19, 2012: We participated in a public information and coordination meeting in Boundary County, Idaho, at the request of Boundary County Commissioners.
- April 28, 2012: We held an informational session (an open house format for personal dialogue and question-and-answer period about the proposed rule) and a public hearing on April 28, 2012, in Bonners Ferry, Idaho, at the request of the Governor of Idaho and the Commissioners of Boundary County, Idaho. The public informational session and public hearing were announced in a press release and in the notice of availability published in the **Federal Register** on March 21, 2012 (77 FR 16512).
- June 16, 2012: We held an informational session and a public hearing in Coolin, Idaho, which was announced in a press release and in the notice of availability published in the **Federal Register** on May 31, 2012 (77 FR 32075).

The Service also notified the public about opportunities for input on the proposed rule through press releases and legal announcements in local newspapers. Information specific to informational sessions and public hearings in Boundary and Bonner Counties was published in the **Federal Register** and the following newspapers within 10 days of the meetings and public hearings: Newport Miner (WA); Spokesman Review (WA); Coeur d'Alene Press (ID); Idaho Statesman (ID); Lewiston Morning Tribune (ID); Bonner County Daily Bee (ID); Bonners Ferry Herald (ID); and Priest River Times (ID). Comment periods, instructions for comment submission, and proposed rule information occurred through press release notifications that reached Idaho and Washington media, citizens, elected officials, tribes, nongovernmental organizations, special interest groups, industry and business, academic institutions, Federal/State/local agencies and other interested parties. All formal public comment was recorded by a court reporter and is incorporated into the public record.

(31) *Comment:* Over the course of the rulemaking process and the three public comment periods, one commenter wrote to request that the public comment period be extended for an additional 6 months. One commenter requested an extension of the public comment period in order to allow time for the Service to educate the community on the proposed critical habitat rule and to allow Federal and State agencies and tribes time to review the proposed critical habitat rule.

Our Response: We requested written comments from the public on the proposed designation of critical habitat for the southern Selkirk Mountains population of woodland caribou during three comment periods, which were open for a total of 150 days. The first 60-day comment period, associated with the publication of the proposed critical habitat rule (76 FR 74018), opened on November 30, 2011, and closed on January 30, 2012. We reopened the comment period for 60 days on March 12, 2012 (77 FR 16512). During the second comment period, we held a public hearing in Bonners Ferry, Idaho, on April 28, 2012.

We also requested comments on the proposed critical habitat designation and associated DEA during a third comment period that opened May 31, 2012, and closed on July 2, 2012 (77 FR 32075). During this comment period, we also held a public hearing on June 16, 2012, in Coolin, Idaho. We believe we have provided adequate time for the public to comment on the proposed rule and associated DEA, to ensure our final determination is based on the best available information.

(32) *Comment:* Several commenters suggested that the public, State governments, and local communities be consulted early in the rulemaking process, as they are key stakeholders in the process. One commenter noted that it is important for proposed critical habitat rules to have public support in order to build trust between the Federal Government and the public. Another commenter expressed concern that the Service had not coordinated with, nor shared the proposed critical habitat rule with, the State of Idaho and Department of Fish and Game prior to publication in the **Federal Register**.

Our Response: The Service is committed to meaningful coordination with all of our partners when it comes to our activities. We also take seriously our responsibility to coordinate with other local, State, and tribal governments and the general public. In regard to this commitment, the Service follows specific policies and procedures to inform the public and all governmental entities when we are considering actions such as listing endangered or threatened species, designating critical habitat, or developing recovery plans. These procedures frequently include opportunities for open meetings or hearings beyond the general notices and letters we send out. While developing the proposed rule, the Service reached out to several Federal and State agency experts and scientists to obtain the most current and best available information for inclusion in the proposed rule. Where agencies were able to respond to these efforts in a timely manner, the information was evaluated, and relevant information was included in the proposed rule.

(33) *Comment:* Commenters stated that the southern Selkirk Mountains population of woodland caribou represents a very small percentage of the overall North American caribou population, that caribou are at home on open tundra in Canada, Alaska, and Greenland (not in Idaho), and questioned the need for the proposed critical habitat in Idaho. Commenters also stated that tens of thousands of

caribou roam Canada and Alaska, which represent the caribou's preferred habitat. One commenter requested clarification regarding the difference between the southern Selkirk Mountains population of woodland caribou and the caribou of the Brooks Range in Alaska.

Our Response: All caribou in the world are a single species (*Rangifer tarandus*); however, there are seven subspecies of caribou. The subspecies found in Alaska, including within the Brooks Mountain range, is the barren-ground subspecies (*Rangifer tarandus granti*), which resides in open tundra and mountainous areas. The southern Selkirk Mountains population of woodland caribou belongs to the subspecies *Rangifer tarandus caribou.* For additional information on woodland caribou, please see the Background section of the 2008 5-Year Review, and for additional information on the southern Selkirk Mountains population of woodland caribou, please see the Background section of the proposed rule published November 30, 2011 (76 FR 74018). Both of these references are available on *http://www.regulations.gov,* or by request from the Idaho Fish and Wildlife Office (see **ADDRESSES**).

(34) *Comment:* Bonner County, Idaho, questioned the need for designating critical habitat for the southern Selkirk Mountains population of woodland caribou, which they believe is ''a direct result of the 1984 listing rule which has been shown to be incorrect.'' The County recommended that if the Service does move forward with a critical habitat rule, the designation should be reevaluated and reduced significantly, using data relevant to north Idaho, in consultation and coordination with the IDL, IDFG, and Bonner County Commissioners.

Our Response: The meaning behind the County's reference to the 1984 listing rule being incorrect is not entirely clear; however, the designation of critical habitat is required when a species is listed as endangered or threatened under section 4(a)(3)(A)(i) of the Act, to the maximum extent it is prudent and determinable. See our response to comment 19 for additional information regarding our prudency determination. This final critical habitat designation fully considers all comments received, which includes scientific information from peer reviewers and the IDFG. Revisions from the proposed critical habitat designation are described in the Summary of Changes from Proposed Rule section.

(35) *Comment:* The Boundary County Commissioners commented that the proposed critical habitat did not contain the PBFs essential to the conservation of the southern Selkirk Mountains population of woodland caribou. The Commissioners also commented that the Service should focus its critical habitat designation on the area of Little Snowy Top Mountain, where all sightings of nontransplanted southern Selkirk Mountains woodland caribou have occurred.

Our Response: The Service based our final designation of critical habitat for the southern Selkirk Mountains population of woodland caribou on the best available scientific information, including comments and information received from peer reviewers, Federal and State agencies, the Kootenai Tribe of Idaho, and public comments received during the three public comment periods. Based on this information, we are designating 30,010 ac (12,145 ha) of critical habitat for the southern Selkirk Mountains population of woodland caribou in the United States that was known to be occupied at the time of listing in 1983 and 1984. All of the areas designated in this final rule contain the PBFs and habitat characteristics essential to conserve the species, for the reasons explained in the ''*Physical or Biological Features*'' section below.

(36) *Comment:* Bonner County, Idaho stated that ''the proposed listing also raises significant concerns about possible Federal nexus situations whereby the County will likely be prohibited from winter snowmobile trail grooming. At present, Bonner County must obtain permission from both the USFS and IDL. Federal nexus situations may also include future requirements to obtain permits for other as yet unknown nexus situations created by further Federal mandates.'' The County also believes ''the proposed listing would significantly impact Bonner County's ability to manage over 400 miles of groomed snowmobile trails used by visitors and residents alike.''

Our Response: Although the County's comment appears to be focused on the ''proposed listing,'' we are assuming they were referring to the proposed critical habitat designation instead. However, there are no Bonner County lands being designated as critical habitat for the southern Selkirk Mountains population of woodland caribou in this final rule.

(37) *Comment:* We received extensive public comments suggesting that designation of critical habitat will result in either a complete closure of the designated area or extensive restrictions to human access within the designated area for recreational purposes (including, but not limited to, snowmobiling, hiking, picnicking, and camping). We received many comment letters both in support of and in opposition to the critical habitat designation based on the assumption that this designation will require land closures and access restrictions. Many supporters noted that there are many opportunities to recreate outside of southern Selkirk Mountains population of woodland caribou habitat, with particular emphasis on snowmobiles. Of the commenters in opposition, some expressed concern that restrictions and closures would have a significant impact on the economy. Other commenters expressed opposition to the proposal because they believe there are few, if any, caribou in the United States, and implementing closures or restrictions on uses is not justified. Finally, a few commenters stated that snowmobiles do not present a real threat to caribou, and therefore areas proposed for designation of critical habitat should not be closed, or have restrictions placed on access.

Our Response: We have no information that would indicate this designation of critical habitat will result in the closure of areas to public access or result in restrictions to currently permissible activities such as recreation on Federal, State, county, or private lands, as is more fully discussed in our response to comment 21. There is also no information that would indicate the designation would result in significant economic impacts, as is discussed in the *Comments Related to Economics and the Draft Economic Analysis* section.

(38) *Comment:* Several commenters objected to the southern Selkirk Mountains population of woodland caribou herd being identified as approximately 36 animals in the proposed rule, stating that few animals have been documented in the United States in recent years. One commenter expressed confusion between the population number provided by the Service (36 animals), and population numbers provided in various media outlets (40 to 60 animals). Several commenters stated they spent considerable time in the areas proposed as critical habitat and have never seen a caribou. One commenter stated that since the Service did not present recent population numbers of the southern Selkirk Mountains population of woodland caribou in the United States in the proposed critical habitat rule, there is no scientific support for a designation of critical habitat.

Our Response: The southern Selkirk Mountains population of woodland caribou is a transboundary population, which moves between British Columbia, Canada and the United States. Although most of this population is known to

inhabit Canada, individual caribou freely move between Canada and the United States. For example, in the last 3 years, the winter census results for southern Selkirk Mountains population of woodland caribou have gone from 43 total caribou with 2 individuals observed in the United States in 2010, to 36 total caribou with none observed in the United States in 2011. Twenty seven caribou were counted in the 2012 winter survey, with 4 of those individuals observed in the United States (Woodland Caribou Census Report 2012, p. 5).

(39) *Comment:* Some commenters opposed critical habitat designation for the southern Selkirk Mountains population of woodland caribou, as they believe the population is not viable. Other commenters suggested that the viability of this population is fragile and that, as a result, the entire proposed area should be designated as critical habitat.

Our Response: The purpose of the Act, in part, is to provide a means to conserve listed species and the ecosystems upon which they depend. Once a species is listed under the Act, we are required to implement conservation actions toward its recovery. The designation of critical habitat is a statutory conservation requirement under the Act, unless designation would not be beneficial to the species. For the southern Selkirk Mountains population of woodland caribou, we have determined that the designation of critical habitat would be beneficial, as has been previously discussed. We have determined that much of the area proposed as critical habitat is not occupied or essential to the conservation of the southern Selkirk Mountains population of woodland caribou. This is more fully discussed in the Summary of Changes From Proposed Rule section.

(40) *Comment:* Several commenters opposed critical habitat designation for the southern Selkirk Mountains population of caribou, as the individuals of this herd in the United States are transplanted individuals, and not native U.S. caribou. Additional comments stated that the transplanted animals did not want to remain in the United States and migrated back to Canada. One commenter indicated the Service should not use telemetry data from transplanted caribou in determining the caribou recovery areas, as these animals did not represent true members of the southern Selkirk Mountains population of woodland caribou.

Our Response: Under section 3(5)(A) of the Act, a critical habitat designation may include the geographical areas occupied by the species at the time of listing on which are found the physical and biological features essential to the conservation of the species and which may require special management considerations or protection, as well as areas outside the geographical area occupied by the species at the time of listing that are determined to be essential for the conservation of the species. This final critical habitat designation: (1) Is based on the best available scientific information (see our response to Comment 1); (2) is within the geographical area occupied by the southern Selkirk Mountains population of woodland caribou at the time of listing; (3) identifies those areas that are essential to the conservation of the species; and (4) will advance important conservation efforts with our partners toward recovering this species.

(41) *Comment:* One commenter recommended that the Service not exclude any areas from critical habitat in the final rule. One organization noted that it accepted the Service's decision not to include the Schweitzer Mountain Resort along the southern boundary on social grounds, given the difficulty of managing there.

Our Response: Section 4(b)(2) of the Act states that the Secretary shall designate and make revisions to critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. The Service did not propose to exclude any areas in the proposed rule, and the Secretary is not exercising his discretion to exclude any areas from critical habitat in the final rule. The Schweitzer Mountain Resort was not proposed for designation as critical habitat (which is not the same as excluding from designation under section 4(b)(2) provisions of the Act), because it is a highly developed recreational destination and does not contain any of the identified PBFs essential to supporting the conservation of this species.

(42) *Comment:* One commenter urged the Service to exclude any areas from critical habitat below 4,000 ft (1,219 m) in elevation due to economic impacts. The commenter also stated, ''an exclusion of this nature would provide clear guidance to Federal agencies when road access agreements are being considered below 4,000 ft (1,219 m) in elevation and when accessing private lands that do not contain critical habitat at higher elevations.''

Our Response: No areas were excluded from critical habitat based on economic impacts; however, the final designation includes areas at 5,000 ft (1,520 m) and higher in elevation. The 5,000 ft (1,520 m) elevation will be the elevation baseline considered by the Federal agencies for purposes of section 7 consultation when evaluating road access agreements. Maps identifying the specific location of these areas are available on the Idaho Fish and Wildlife Service Web page, *http://www.fws.gov/idaho,* or from that office (see **ADDRESSES**).

(43) *Comment:* Many comments suggested that the Service should increase the proposed designated critical habitat to include: (1) The entire recovery area identified in the 1994 Recovery Plan (443,000 ac) (179,276 ha); (2) areas currently unoccupied, as they may become more important as the southern Selkirk Mountains population of woodland caribou recovers; (3) large areas required to maintain connectivity between essential habitats, especially in light of the impacts of climate change; or (4) areas of historical occupation, such as additional areas in Washington and Idaho, as well as in Montana. Some commenters indicated concern that the critical habitat area as proposed would not support a fully recovered population of southern Selkirk Mountains woodland caribou. One commenter urged the Service to consider including the Priority Areas 1, 2, and 3 as outlined in Kinley and Apps (2007) in the critical habitat designation.

Our Response: See Section ''*Criteria Used To Identify Critical Habitat*'' below for a discussion of our rationale for constructing the critical habitat unit, including the biological needs of the species, seasonal habitat requirements, and the relationship of the essential PBFs and primary constituent elements to the conservation needs of the southern Selkirk Mountains population of woodland caribou. The Service used the best available scientific information on the southern Selkirk Mountains population of woodland caribou seasonal use of habitat and movement between habitats to quantify the areas we are designating as critical habitat, including the Priority 1, 2, and 3 areas identified in the Kinley and Apps (2007) model. If additional data become available in the future, the Secretary can revise the designation under the

authority of section 4(a)(3)(A)(ii) of the Act, as appropriate.

(44) *Comment:* Many comments suggested that the proposed critical habitat designation was too large, and that either specific areas should be removed from the final designation, or the Service should not designate any critical habitat for the southern Selkirk Mountains population of woodland caribou because: (1) Fires have eliminated old-growth forests in the historical range of the caribou in the United States, and no suitable habitat exists; (2) the proposed critical habitat areas do not contain the physical or biological features necessary for the survival of the southern Selkirk Mountains population of woodland caribou; or (3) recent studies indicate the majority of the range and movements of the southern Selkirk Mountains population of woodland caribou occurs at or above 5,500 ft (1,676 m).

Our Response: We have used the best scientific data available to inform our final determination of critical habitat for the southern Selkirk Mountains population of woodland caribou, as is required under section 4(b)(2) of the Act. All areas designated as critical habitat contain one or more of the PCEs essential to the conservation of the species. See our response to comment 43 for additional information.

(45) *Comment:* Several commenters indicated that the United States comprises only the southernmost portion of the range of the southern Selkirk Mountains population of woodland caribou, and this habitat is unsuitable to support the caribou population. Therefore, they believe critical habitat should not be designated in the United States. One commenter stated that protecting species that have their full range within the United States should be the focus of the Service's efforts.

Our Response: The critical habitat being designated in this final rule represents the geographical areas essential to the conservation of the southern Selkirk Mountains population of woodland caribou, within the area known to be occupied at the time of listing. The biological basis for this determination is more fully explained in the Critical Habitat section, below.

(46) *Comment:* One commenter indicated that the Service cannot rely on a map showing individual caribou observations, as a map showing observed locations is not relevant when individual animal tracking is not utilized (one animal can create many or most of the location marks over a period of many years). Another commenter stated that data points used to identify caribou locations should only be from the native southern Selkirk Mountains population of woodland caribou, not transplanted animals.

Our Response: We used the best available information, including reports, peer-reviewed literature, and other data, to make our final determination on the area to be designated for critical habitat for the southern Selkirk Mountains population of woodland caribou. We have provided a thorough description of our analysis in the *Criteria Used to Identify Critical Habitat* section in the final rule. Telemetry data from transplanted animals was not used as a basis for establishing the geographical area occupied at the time of listing in the final rule. See our response to Comment 1 for additional information regarding occupancy data used to establish the geographic area occupied by the southern Selkirk Mountains population of woodland caribou at the time of listing.

(47) *Comment:* Several commenters noted that the draft land management plan for the IPNF proposes area designations, such as wilderness, primitive, and backcountry, which have allowable activities within these designations that are likely not compatible with caribou recovery and caribou critical habitat goals. For example, backcountry and primitive designations may allow motorized winter recreation. The potential increase in wilderness designation within the draft land management plans may have an impact on the potential losses of critical habitat due to wildfire. Suppression of wildfires within wilderness is generally a low priority nationally. Potential wilderness designations within caribou recovery and critical habitat should include measures for aggressive fire suppression to prevent losses of caribou habitat within wilderness.

Our Response: The approval and implementation of land management plans on National Forest Service lands are Federal actions subject to section 7 consultation under the Act by the land management agency. The Service is not a land management agency in any of the areas being designated as critical habitat. The Act prohibits Federal agencies from carrying out actions that would destroy or adversely modify critical habitat. With regard to the above activities, it is the responsibility of the Federal land management agency to consider the effects of its actions on designated critical habitat. For purposes of critical habitat, section 7 consultation is only triggered when the Federal agency determines that its action may affect critical habitat. Actions that (1) may affect, but are not likely to adversely affect, or (2) result in wholly beneficial effects to critical habitat, are evaluated through informal consultation with the Service. It is the responsibility of Federal agencies to request formal section 7 consultation for actions that may affect, and are likely to adversely affect critical habitat. During the consultation process, if we conclude that a proposed action is likely to result in the destruction or adverse modification of critical habitat, we are required to provide the Federal agency with a biological opinion describing reasonable and prudent alternatives to the action that would avoid the destruction or adverse modification of critical habitat. Such alternatives must be economically, as well as technologically, feasible (50 CFR 402.02). See the Effects of Critical Habitat Designation section for additional information on section 7 requirements as they relate to this final designation of critical habitat for the southern Selkirk Mountains population of woodland caribou.

(48) *Comment:* Several commenters indicated that the designation of critical habitat would prevent certain land uses and land use management, specifically timber harvesting and wildfire suppression. One commenter expressed concern that curtailing timber management within the critical habitat area would result in greater fuel loads and increased risk of catastrophic fires, which in turn could threaten the southern Selkirk Mountains population of woodland caribou. The commenter stated that there are silvicultural practices that could benefit the caribou and its habitat over the long term.

Our Response: Please refer to our response to comment 13 regarding fire and timber management. We acknowledge that natural wildfire plays an important role in maintaining a mosaic of forest successional stages that provides habitat for a variety of species endemic to this ecosystem, and that fire suppression can alter vegetative mosaics and species composition. Therefore, in this final rule we have incorporated language addressing the importance of developing and implementing a wildland fire use plan to allow for the appropriate non-suppression of naturally ignited fires, and the implementation of a prescribed fire program.

(49) *Comment:* At least one commenter alleged, ''Federal land and resource agencies routinely act without prior consultation with the U.S. Border Patrol (USBP), and without regard to National Security implications.''

Our Response: We disagree with the comment with respect to the Service. As we developed this final rule, we coordinated with the USBP through formal and informal notices, stakeholder calls, public meetings, presentations at Spokane Sector Border Management Task Force meetings, and interagency meetings. The purposes of this interaction were to share and clarify information regarding the proposed rule and to seek feedback on any concerns. Although we did not receive any written comments from the USBP in response to the proposed rule, we have fully considered all information provided by the agency during our various interactions in this final rule. See our response to comment 51 with regard to USBP activities for additional information.

(50) *Comment:* A few commenters were concerned that critical habitat designation for the southern Selkirk Mountains population of woodland caribou would affect USBP operations.

Our Response: Throughout the critical habitat designation process, there was an erroneous public perception that designating critical habitat equated to a closure of the designated area. The Service does not manage any of the lands being designated as critical habitat. Further, the designation of critical habitat does not affect land ownership, or establish any closures, refuges, wilderness areas, reserves, preserves, or restrictions on use or access to the designated areas. The designation of critical habitat for the southern Selkirk Mountains population of woodland caribou would not restrict, regulate, or determine the ability of the USBP to operate in close proximity to the border. Within caribou habitat, the USBP operates, for the most part, on National Forest System lands and its existing roads and trails. The March 31, 2006, Memorandum of Understanding (MOU) between the Secretary of the Interior, Secretary of Homeland Security, and Secretary of Agriculture Regarding Cooperative National Security and Counterterrorism Efforts on Federal Lands Along the U.S. Borders commits the agencies to preventing illegal entry into the United States, protecting Federal lands and natural and cultural resources, and where possible, preventing adverse impacts associated with illegal entry by cross-border-violators (CBVs). The intent of the MOU is to provide consistent goals, principles, and guidance related to border security, such as law enforcement operations; tactical infrastructure installation; utilization of roads; minimization and/or prevention of significant impact on or impairment of natural and cultural resources; implementation of the Wilderness Act, Endangered Species Act, and other related environmental laws, regulation, and policies across land management agencies; and provide for coordination and sharing information on threat assessments and other risks, plans for infrastructure and technology improvements on Federal lands, and operational and law enforcement staffing changes. Through this 2006 MOU, and local groups such as the Spokane Sector Borderlands Management Task Force, the three departments are cooperating to understand, respect, and accomplish their respective missions. The MOU includes provisions for Customs and Border Protection (CBP) vehicle motor operations on existing public and administrative roads and/or trails and in areas previously designated by the land management agency for off-road vehicle use at any time, provided that such use is consistent with presently authorized public or administrative use. It also includes provisions for CBP requests for access to additional Federal lands (*e.g.,* areas not previously designated by the land management agency for off-road use) for such purposes as routine patrols, nonemergency operational access, and establishment of temporary camps or other operational activities. The MOU states: ''Nothing in this MOU is intended to prevent CBP–BP agents from exercising existing exigent/emergency authorities to access lands, including authority to conduct motorized off-road pursuit of suspected CBVs at any time, including in areas designated or recommended as wilderness, or in wilderness study areas when, in their professional judgment based on articulated facts, there is a specific exigency/emergency involving human life, health, safety of persons within the area, or posing a threat to national security, and they conclude that such motorized off-road pursuit is reasonably expected to result in the apprehension of the suspected CBVs.'' Accordingly, there is no verifiable information that would suggest the designation of critical habitat for the southern Selkirk Mountains population of woodland caribou would affect CBP operations.

(51) *Comment:* A commenter stated that the Service does not understand that a Federal nexus exists on virtually every timber harvest on all land ownerships, be they Federal, State, or private. They believe that there are many places where the Federal Government has rules and regulations affecting timber harvest on all forested lands, and that any timber sale could be stopped within the area designated as critical habitat.

Our Response: In the 29 years since the southern Selkirk Mountains population of woodland caribou was emergency listed in 1983 (48 FR 1722), the States of Washington and Idaho have not been required to consult with the Service, as there has not been an activity with a Federal nexus (*e.g.,* a Federal permit such as a Corp of Engineers (COE) 404 permit, or the use of Federal funds). However, even if there was a Federal nexus, the timber harvest would not necessarily be prohibited. Federal action agencies must evaluate the potential effects of each action on its own merits, carrying out actions that would destroy or adversely modify critical habitat. A Federal action (*e.g.,* winter recreation, energy transmission, mining, or road construction) that is not likely to cause destruction or adverse modification of caribou habitat may not be materially affected by a critical habitat designation. If a Federal action would result in destruction or adverse modification of caribou habitat, the Service would suggest reasonable and prudent alternatives to avoid the destruction or adverse modification of critical habitat. As stated earlier, during the section 7 consultation process, if we conclude that a proposed action is likely to result in the destruction or adverse modification of critical habitat, we are required to provide the Federal agency with a biological opinion describing reasonable and prudent alternatives to the action that would avoid the destruction or adverse modification of critical habitat. Such alternatives must be economically, as well as technologically, feasible (50 CFR 402.02).

(52) *Comment:* A commenter stated the proposed rule fails to include a discussion of the types of ''special management considerations or protections'' potentially needed that differ from current and recent uses. Therefore, the threats to habitat cannot be adequately addressed in the context of section 7 consultation or other measures. This is a reason for a more inclusive extent of critical habitat than what is proposed.

Our Response: The proposed rule identifies the types of Federal actions that may affect critical habitat, and should result in section 7 consultation (see *Application of the ''Adverse Modification''* Standard), (76 FR 74030; November 30, 2011). For these types of actions, any management actions necessary for a particular Federal action would be case-specific and depend on

the outcome of the section 7 consultation process. Within the area designated as critical habitat for the southern Selkirk Mountains population of woodland caribou, the Service's 1994 Recovery Plan, and the CNF and IPNF LRMPs contain standards and guidelines pertaining to the management of the species and its habitat. See the Special *Management Considerations or Protections* section below for additional information.

(53) *Comment:* Several commenters fear that, given the critical habitat designation is in response to a court-ordered settlement agreement in a case initiated by environmental organizations, the true intent of these environmental organizations is to close more public lands to access, and the designation of critical habitat is one way of accomplishing this.

Our Response: The Service has no control over the future actions of environmental groups, recreational organizations, development or timber interests, governmental organizations, or others, with regard to their future responses to the final critical habitat designation. As stated earlier, throughout the critical habitat designation process, there was an erroneous public perception that designating critical habitat equated to a closure of the areas being designated. However, the designation of critical habitat does not affect land ownership, or establish any closures, refuges, wilderness areas, reserves, preserves, or restrictions on use or access to the designated areas. It does require that Federal agencies consult with us under section 7 of the Act if their actions may affect critical habitat. See our response to Comment 51 which discusses our section 7 consultation history since the southern Selkirk Mountains population of woodland caribou was listed under the Act.

(54) *Comment:* One commenter asserted that since designation of critical habitat can potentially have significant impacts upon the environment, economy, and quality of life of people within the affected region, preparation of an Environmental Impact Statement (EIS) is warranted.

Our Response: As stated in the proposed rule (76 FR 74033), outside the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit, we do not need to prepare environmental analyses pursuant to the National Environmental Policy Act (NEPA) in connection with designating critical habitat under the Act. We published a notice outlining our reasons in the **Federal Register** on October 25, 1983 (48 FR 49244). The U.S. Court of Appeals upheld this position for the Ninth Circuit (*Douglas County* v. *Babbitt,* 48 F.3d 1495 (Ninth Cir. 1995), cert. denied 516 U.S. 1042 (1966)).

(55) *Comment:* Two commenters, including the City of Bonners Ferry, commented that part of the watersheds for the City of Bonners Ferry's primary source of drinking water (Myrtle Creek and Snow Creek drainages) are within the proposed caribou critical habitat designation. These commenters oppose any further regulations or restrictions placed on the USFS, or any other entity, that would adversely affect the management of those watersheds for providing the City of Bonners Ferry's drinking water. One commenter recommended that consideration be given for removal of the Myrtle and Snow Creek watersheds from critical habitat designation, including areas beyond the watersheds, to control pollution, infestation, or wildfires.

Our Response: Although the watershed for the City of Bonners Ferry is not included in the final critical habitat designation for the southern Selkirk Mountains population of woodland caribou, the Service appreciates and is sensitive to the City of Bonners Ferry's desire to protect the Myrtle and Snow Creek drainages, which are the primary sources of drinking water for the city. Federal agencies have been coordinating with the Service on the management of caribou and its habitat since this population was emergency listed in 1983. We recognize that uncontrolled wildfires can have devastating effects on the water quality of watersheds. Hence, the Service participated in the development of the Myrtle Creek Healthy Forest Restoration Project, which was designed in 2007 to reduce the wildfire risk in the Myrtle Creek watershed through management of hazardous fuels. Finally, we are committed to working with the USFS to develop a strategy that provides direction to the USFS for the use of natural and unplanned fires, and have incorporated language into the final rule addressing this issue.

(56) *Comment:* Many commenters suggested that the Service should increase the proposed critical habitat designation due to climate change, while others commented that the proposed critical habitat designation should be decreased or not designated due to climate change predictions.

Our Response: We acknowledge that climate change could change the suitability of southern Selkirk Mountains population of woodland caribou habitat in the future. However, we are required to designate critical habitat based upon the best available scientific data at the time that we finalize the designation. At this point in time, reliable projections of future climate change in caribou habitat are not available. We acknowledge that higher elevation habitat is likely to become increasingly important in the face of potential climate changes. In this regard, designated critical habitat includes high elevation habitat and migratory corridors between suitable habitat areas in the United States and Canada. We also find the best scientific information available suggests that the range of the southern Selkirk Mountains population of woodland caribou has largely shifted northward, and the vast majority of the areas that provide the essential PBFs for this population of woodland caribou now occur within Canada. See *Criteria Used To Identify Critical Habitat* below for a discussion of our rationale for constructing the critical habitat unit. Critical habitat can be revised under section 4(a)(3)(A)(ii) of the Act as appropriate, as additional scientific data on climate change or other significant information becomes available.

(57) *Comment:* Some commenters suggested that, in the face of climate change, the threat from predation would increase and that, because of this increased threat, there was no need to designate critical habitat.

Our Response: We acknowledge that climate change may have presently unknown effects on predation and other threats in the future. Utzig (2005 p. 10) states that it is impossible to predict specific changes to the ecosystems that contribute to caribou mortality (*i.e.,* predation and other causes) due to climate change. However, the Service has a statutory obligation under section 4(b)(2) of the Act to designate critical habitat, in part, based on the best available scientific data available. Since there is no scientific information that would inform a reliable projection regarding the interaction between climate change and predation, we are unable to factor the concern raised into the final critical habitat designation.

(58) *Comment:* During a public hearing, one commenter suggested that suitable habitat did not exist in the Selkirk Mountains due to changes in vegetation reflected in the U.S. Department of Agriculture's (USDA) Plant Hardiness Zone Maps. The commenter stated the Selkirk Mountains should not be designated as critical habitat, based on this information.

Our Response: The USDA Plant Hardiness Zone Maps are based on average annual winter temperatures, and reflect standards by which

gardeners and growers can determine which plants are most likely to thrive in a given location. However, information provided by a Forest Ecologist/Forest Silviculturist with the IPNF (Zack 2012, pers. comm.), suggests that native vegetation species generally have adaptive tolerance to a range of climatic conditions, and that in the last few decades, the IPNF has not observed any shifts in boundaries for habitat type groups (*e.g.,* subalpine fir/Engelmann spruce, and western hemlock/western red cedar climax forests). Habitat types are land classifications based on potential natural vegetation defined as ''all those land areas potentially capable of supporting similar plant communities at climax.'' (Cooper, Neiman, Roberts. 1991. Forest Habitat Types of Northern Idaho: A second Approximation) (Zack 2012, pers. comm.). Similar to the IPNF, we do not anticipate any shifts of vegetation boundaries have occurred on the CNF with respect to habitat type groups (*e.g.,* subalpine fir/Engelmann spruce, and western hemlock/western red cedar climax forests) due to the fact that the CNF is within the same mountain range as the IPNF and containing similar elevations, soils, geology, precipitation patterns, etc., as the IPNF.

Federal Agency Comments

(59) *Comment:* The U.S. Forest Service (USFS) Pacific Northwest Region commented that: (1) The proposed critical habitat rule cautions about management activities that reduce and fragment areas in a manner that creates a patchwork of different age classes or prevents young forests from achieving old-growth habitat characteristics; (2) part of the concern is that this patchwork draws other ungulates within proximity of caribou; and (3) this consequently brings in predators such as mountain lions and wolves. They also commented that within the cedar/hemlock and subalpine fir/spruce zones, there are instances of inclusions of lodgepole pine or other seral tree cover types, and that removing these seral trees through timber harvest or fire, and managing for shade-tolerant understory, could hasten the conversion of these sites to suitable caribou habitat. They requested that the Service characterize the degree to which created openings may be considered as management tools to maintain or promote suitable caribou habitat in such cases.

Our Response: We are unable to identify a characteristic opening size within caribou habitat that would always be compatible with, or promote the development of, suitable caribou habitat. As the USFS suggests, created openings may facilitate the retention or development of old-growth characteristics suitable for use by caribou. However, the effective sizes of these openings would best be determined on a site-specific basis, taking into consideration the existing forested ecological conditions and the natural disturbance history of the area. We will continue to work with the USFS to gain more information regarding these management options and their scientific applicability within caribou critical habitat areas.

(60) *Comment:* The USFS commented that the proposed rule notes the IPNF and the CNF have vegetation management direction in existing Forest Plans, which contribute to the protection of the essential PBFs by analyzing timber management actions on a site-specific basis to consider impacts to caribou habitat. They commented that Forest Plan direction allows the USFS to treat areas to help trend capable habitat into suitable habitat for caribou, but the Application of the Adverse Modification Standard section in the proposed rule indicates that many silvicultural activities used to help trend capable habitat toward suitable habitat (*e.g.,* thinning, prescribed fire, timber harvest) would adversely modify critical habitat. The USFS suggested adding a statement to the Application of the Adverse Modification Standard section clarifying that stands that are not currently suitable (*i.e.,* have a preponderance of less desirable cover types such as lodgepole pine), and are not likely to attain suitability absent a stand-replacing disturbance event, may need treatment to facilitate movement towards preferred cover types (such as subalpine fir).

Our Response: We acknowledge that timber harvest in some situations may be used to achieve or promote a more rapid attainment of tree species composition or certain structural characteristics (*e.g.,* old growth), and that the effects of silvicultural practices (*e.g.,* commercial harvests, thinning, etc.) to critical habitat are scale-dependent. We do not anticipate that either the IPNF or CNF would propose a timber harvest at the scale that would result in the adverse modification of critical habitat. For a proposed Federal action to result in adverse modification (*i.e.,* substantially reduce the conservation value of the critical habitat area to an extent that would affect its ability to serve its intended recovery role), it would likely have to significantly alter large areas of high-elevation mature to old-growth western hemlock/western red cedar climax forest, or subalpine fir/Engelmann spruce climax forest, or significantly restrict caribou movement through such areas. The scale of such a project would be such that it would essentially affect the landscape, versus a forest stand or multiple forest stands. As stated previously, Federal agencies have been consulting with the Service on caribou, within the area designated as critical habitat, since the species was emergency listed in 1983. Many of these consultations involved timber harvest, and none of the consultations involving timber harvest resulted in jeopardy determinations. Therefore, in light of our history of consultations with Federal land management agencies, we find that it is unlikely that a Federal agency would propose a timber harvest project at a scale that would potentially represent jeopardy to the species and/or adverse modification of designated critical habitat. Nonetheless, should this occur, to avoid adverse modification we would most likely recommend reducing the scale of impacts to mature and old growth stands within western hemlock/western red cedar and subalpine fir/Engelmann spruce forests. If impacts are temporary or seasonal in nature and avoidance is not possible, the Service would most likely recommend temporary, seasonal timing constraints be employed to avoid disruption of caribou movement and/or seasonal habitat use.

(61) *Comment:* The IPNF stated that blanket direction to always take rapid response measures whenever wildfire occurs in the area may be detrimental to other species (*e.g.,* grizzly bear, lynx, and whitebark pine), and is not ecologically sustainable. They suggested a better course of action would be to rapidly analyze the appropriate actions to take (or perhaps not take), which considers the needs of all resources and species.

Our Response: We agree that natural wildfire plays an important role in maintaining a mosaic of forest successional stages that provides habitat for a variety of species endemic to this ecosystem, and that fire suppression can alter vegetative mosaics and species composition. Therefore, in this final rule we have incorporated language addressing the importance of developing and implementing a wildland fire use plan to allow for the appropriate nonsuppression of naturally ignited fires, and the implementation of a prescribed fire program. Such a program would be prudent to implement across all IPNF ownership, including within the area designated as critical habitat for caribou.

(62) *Comment:* The IPNF commented that language in the proposed rule pertaining to ''little to no disturbance'' within designated caribou critical habitat should be clarified. The IPNF is concerned over how this language may affect recreational activities such as snowmobiling and hiking, as well as U.S. Customs and Border activities.

Our Response: One of the survival strategies of caribou is to spread out over large areas at high elevations, thereby reducing their density and, thus, susceptibility to predation (Seip and Cichowski 1996, p. 79; MCTAC 2002, pp. 20–21; Kinley and Woods 2006, all). Fragmentation and loss of caribou habitat make it difficult for the species to spread out over large areas, and these have been identified as threats to caribou conservation (USFWS 2008, pgs. 16–17). Caribou are also sensitive to winter recreational activities, and may be displaced from habitat by recreational activities, especially snowmobiling (Kinley 2003, pg. 25; Seip *et al.* 2007, pg. 1543; Mahoney *et al.* 2001, pg. 42; Reimers *et al.* 2003, pg. 751; Tyler 1991, pgs. 183–188). Additionally, one peer reviewer stated that interactions between caribou and hikers on preferred summer range may increase susceptibility of caribou to predation (Allen 2012, pers. comm.). Thus, recreational activities can exacerbate the effects of forest fragmentation and loss to caribou by further condensing caribou habitat use into smaller areas. Forcing caribou into smaller areas (*i.e.,* increasing their density) may increase their susceptibility to predation. Predation, while not necessarily within the scope of this rule to address, is nonetheless a factor that has been identified as a long-term threat to caribou persistence. Therefore, the proposed rule suggests that human activities in designated caribou critical habitat should be minimized to reduce some of the ongoing effects of caribou habitat fragmentation upon the species. However, we acknowledge that the IPNF has implemented extensive measures to protect caribou and caribou habitat on its ownership, both within the area proposed for designation as critical habitat as well as the existing Selkirk Mountain Caribou Recovery Zone. Therefore, we do not foresee or anticipate substantive changes in the existing management of caribou or its habitat within the area designated as critical habitat on IPNF ownership.

Regarding the final rule's effect upon USBP activities, the designation of critical habitat for southern Selkirk Mountains woodland caribou would not restrict, regulate, or determine the ability of the USBP to operate in close proximity to the border, as has previously been discussed in more detail in our response to comment 50.

(63) *Comment:* The IPNF commented that much of the area listed as occupied by the southern Selkirk Mountains population of woodland caribou at the time of emergency listing was not actually occupied in 1983, and suggested the Service designate a defined habitat (*i.e.,* mature old growth subalpine fir—cedar hemlock) as occupied and unoccupied based on the recovery plan and other information on occupancy in 1983.

Our Response: We have determined that the area generally depicted in Scott and Servheen (1984, p. 27), adjusted for elevation and habitat based on the seasonal habitat suitability model developed by Kinley and Apps (2007, entire) for the southern Selkirk Mountains ecosystem, represents the best available scientific information regarding the geographic area occupied by caribou at the time of listing. For further explanation, see comment 1.

(64) *Comment:* The IPNF commented that the findings of Kinley and Apps (2007) should be used in conjunction with other stand-based data from land management agencies (*i.e.,* the USFS and the IDL) to inform our final critical habitat designation.

Our Response: The area we proposed for designation as southern Selkirk Mountains population of woodland caribou critical habitat was based on a synthesis of the best available scientific information that included Kinley and Apps (2007), as well as other relevant scientific documents and records pertaining to the historical and current distribution and habitat use of the southern Selkirk Mountains population of woodland caribou. We received numerous comments from various commenters including peer reviewers, Federal agencies, the State of Idaho, the Kalispel and Kootenai Tribes, and members of the public regarding the science we used and synthesized to develop the proposed designation. We utilized all substantive input from these commenters in refining the designation of critical habitat for the southern Selkirk Mountains population of woodland caribou in this final rule. Based on this input, the final designation differs from the proposed designation in several ways, which are identified in the Summary of Changes section of this rule.

Comments Related to Economics and the Draft Economic Analysis

(65) *Comment:* The Bonner County Commissioners commented that economic impacts of recreational access restrictions will be significant, stating that local resorts reported losses of up to 70 percent of their winter revenue following the first caribou closure. They expressed concern that Federal nexus situations could result in the County being prohibited from winter snowmobile trail grooming, and that additional businesses may close if further restrictions cut deeper into winter revenues of resorts, eating and drinking establishments, grocery stores, and other businesses that benefit from snowmobile revenues. This concern was also expressed by the State of Idaho. The County expressed concern that the loss of additional full-time employment could threaten the viability of the elementary school, which has only 45 students, and stated that Priest Lake's winter economy is fragile, based on recreational tourism, and sensitive to changes in recreational activities. Another commenter expressed concern about losing winter income due to trail closures, and requested an ''on the ground'' study to determine the economic impact on small entities. They stated that most of the communities around the proposed critical habitat are small and relied on timber products and logging as a primary income base for years, later adapting to a recreation-based economy.

Response: The final designation of critical habitat has been reduced from 375,562 ac (151,985 ha) in the proposed critical habitat rule to 30,010 ac (12,145 ha) in this final rule (see response to Comment 1). There are no Bonner County lands included in the final designation. As a result, the only incremental economic impacts that would occur are the additional administrative costs to the Federal agencies associated with section 7 consultation in areas within the CNF, Idaho Panhandle (Kaniksu) National Forest, and Salmo-Priest Wilderness areas. We do not anticipate any economic costs to recreational interests beyond existing requirements under USFS management plans or other policies.

(66) *Comment:* The Idaho State Snowmobile Association (ISSA) submitted an economic study completed by Forest Econ Inc. (FEI) on impacts that have occurred since 2005, looking primarily at recreation and timber harvesting (FEA, p. ES–6). The results of the study are based on assumptions that all forest owners would require Environmental Protection Agency (EPA) NPDES (National Pollutant Discharge Elimination System) permits for point source outfalls (*i.e.,* logging roads), starting in 2010, and a subset of those

forest owners would have restrictions placed on timber harvesting due to southern Selkirk Mountains population of woodland caribou conservation efforts. The study expands its assumptions by projecting indirect effects to mills and other economic activities that depend on timber harvesting. As a result, the FEI study estimates $4.6 million in lost annual earnings to the timber industry in northern Idaho, $37,000 in lost annual earnings in the Priest Lake area due to other forestry effects, and up to 76 recreational jobs lost in the Priest Lake area.

Response: Forest Econ Inc. uses input-output modeling to analyze regional economic impacts (*i.e.,* output and employment) on two spatial scales: impacts to the Priest Lake area and impacts to the broader Northern Idaho region. The main activities analyzed in the report are recreation and timber harvesting, which collectively make up the majority of the local winter economy in the Priest Lake area (46 percent tourism and 16 percent wood products), according to the report. To analyze snowmobiling impacts, FEI began documenting economic impacts in 2005—the year in which Defenders of Wildlife, Conservation Northwest, the Lands Council, Selkirk Conservation Alliance, Idaho Conservation League, and Center for Biological Diversity challenged two biological opinions, which resulted in the injunction that restricted winter recreation through trail closures. The authors used two approaches to determine local effects of these events in the Priest Lake area: (1) a statistical analysis of changes in snowmobile trips using registration and groomer permits over the period of the analysis, and (2) detailed surveys of the economic impacts to local businesses. The table below summarizes these impacts, as predicted by FEI. This estimate to impacts to the local economies was based on the area originally proposed for designation, and not on the geographic area delineated within the final designation, which has been reduced by 345,552 ac (139,840 ha) from the proposed rule. The analysis performed by Forest Econ, Inc., therefore, does not address the potential impacts of a much smaller critical habitat designation, which is now solely on USFS lands.

TABLE 1—LOCAL ECONOMIC IMPACTS REPORTED BY FOREST ECON, INC.

Impacts	Location	Jobs lost	Lost annual earnings
Recreation	Priest Lake Area	26 (approach 1), 76 (approach 2)	N/A
Timber	Northern Idaho	126	$4,600,000
Other Forestry Effects	Priest Lake Area	−12	37,000

(67) *Comment:* One commenter noted that it is important for the economic analysis to compare the local economy to other counties in Idaho without caribou restrictions, and to the national and international economies. The commenter also suggested that changes in snow precipitation over time should also be a factor considered within the immediate area and the broader regional economy. They stated that this approach would help distinguish the recovery area impacts from those that we have no immediate control over, but that we should be taking into consideration when undertaking any future planning.

Response: Section 4(b)(2) of the Act requires, in part, that we take into consideration the economic impact of specifying any particular area as critical habitat. The economic analysis prepared for this final rule addresses that requirement by considering the incremental costs associated with the designation, which are above and beyond costs attributable to the listing of the southern Selkirk Mountains population of woodland caribou (*i.e.,* the baseline costs). Accordingly, preparing an economic analysis that compares the local economy with other Idaho counties and the national and international economies would be beyond the scope of the proposed rule. Although the rationale behind the commenter's suggestion that we include snow levels as a factor evaluated in the economic analysis is not entirely clear, the suggested approach would not be relevant or informative to the final designation of critical habitat for this species.

(68) *Comment:* The State of Idaho notes that there could be actions with a Federal nexus on IDL-managed lands that could trigger section 7 consultation regarding caribou critical habitat and that are not recognized in the DEA. IDL expressed concern that the Service ignored costs of the designation under the presumption that there is no Federal nexus to initiate a section 7 consultation. The IDL questioned the rationale behind using the lack of a formal consultation history with the COE for section 404 permits on IDL lands as a prediction for future consultation requirements. The IDL also commented that the COE would have to initiate formal consultation due to prior case law surrounding the ''but for test'', and that since a majority of IDL stream crossing installations and upgrades are directly tied to timber sales due to the funding component, any timber sale management activity associated with the permitted installation could be subject to consultation.

Response: Section 7(a)(2) of the Act requires that Federal agencies insure that any action authorized, funded, or carried out is not likely to jeopardize the continued existence of any endangered or threatened species, or destroy or adversely modify critical habitat. The Federal agency is responsible for contacting the Service for a list of endangered or threatened species and their critical habitats or technical assistance, and making the effects determination. The outcome of the Federal agency's effects determinations can include (1) no effect; (2) may affect, but not likely to adversely affect; or (3) may affect, and likely to adversely affect. With regard to critical habitat, formal consultation is only triggered for actions that are likely to adversely affect listed species. A Federal agency does not need to initiate formal consultation if, as a result of the preparation of a biological assessment under 50 CFR 402.12, or as a result of informal consultation with the Service under 50 CFR 402.13, the Federal agency determines (with the written concurrence of the Director), that the proposed action is not likely to adversely affect any listed species or critical habitat. Accordingly, formal section 7 consultation is not an unconditional requirement. Since there are no IDL lands being designated as critical habitat by this final rule, no additional requirements would be imposed on the State as a result of the critical habitat designation. However, Federal requirements could still be applicable on State lands for other activities (*e.g.,* Clean Water Act permits or compliance with best management

practices associated with silvicultural exemptions for activities such as road construction, stream crossings, fill discharged into waters of the United States to support staging areas, rock quarries, landings, etc.).

(69) *Comment:* IDL notes that on page 2–2, paragraph 35 of the DEA, there is direction in 2001 to measure coextensive impacts.

Response: In 2001, the U.S. Court of Appeals for the Tenth Circuit instructed the Service to conduct a full analysis of all of the economic impacts of proposed critical habitat, regardless of whether those impacts are attributable coextensively to other causes. Since that decision, however, courts in other cases have held that an incremental analysis of impacts stemming solely from the critical habitat designation is proper (FEA p. 2–2), (*Arizona Cattle Growers' Assoc.* v. *Salazar,* 2009 U.S. App. Lexis 29107 (9th Cir. June 4, 2010)), *Otay Mesa Property L.P.* v. *DOI,* 2010 U.S. Dist. Lexis 52233 (D.D.C. May 27, 2010)). Additionally, on October 3, 2008, the Department of Interior's Office of the Solicitor issued a Memorandum Opinion (M–37016) that summarizes recent case law on this issue and corroborates that the incremental analysis of economic impacts is appropriate.

(70) *Comment:* IDL stated that they completed a detailed analysis of the very real economic impact this proposed designation would cause, which was ignored by the Service. The IDL analysis projects the designation would significantly impact IDL's ability to manage over 65,000 ac (26,260 ha) of forestlands, significantly reduce revenues to K–12 public education, and increase fire protection costs. The calculated value of timber revenue loss over the next 30 years was estimated to be $23,030,810, with an average annual loss of $713,470. The IDL analysis projected losses of 109,800 mbf of timber volume, 1,976 jobs, $67,417,200 in foregone income, and $285,480,000 in foregone goods and services over a 30-year period. They also projected combined costs related to fire suppression to exceed $3,495,310 over a 30-year period.

Response: The basis for IDL's economic analysis is an assumption that IDL would be required to adopt Federal harvest restrictions and meet onerous and costly Federal requirements based on the presence of a Federal nexus for their activities, which we are unable to substantiate. Additionally, the presence of a Federal nexus does not necessarily equate to additional conservation measures being required for a particular activity, since there are several possible outcomes to section 7 consultation. Nevertheless, there are no IDL lands being designated as critical habitat in this final rule.

(71) *Comment:* IDL stated concerns that any harvesting of stands with old-growth characteristics is considered habitat degradation, and may therefore be restricted if critical habitat is designated.

Response: Based on a revision of the critical habitat boundaries, IDL lands are no longer included in the designation. As stated earlier, we do not expect changes in forest management on any lands solely due to the critical habitat designation for the southern Selkirk Mountains population of woodland caribou, since a jeopardy analysis under section 7, which is triggered by the listing of a species under the Act, also considers harm to habitat. If a section 7 consultation were to be required on any timber lands that had old growth characteristics, it is unlikely that any project modifications in that area would be attributable solely to the critical habitat designation, since any conservation measures required to avoid jeopardy would likely be identical to measures needed to avoid adverse modification of critical habitat.

(72) *Comment:* The U.S Forest Service noted two concerns about the economic analysis that relate to management of lands within IPNF: (1) the analysis does not consider the effects on summer recreation and the business that supports those activities, and (2) the analysis only considers activities with a Federal nexus, therefore missing effects on businesses that support recreation.

Response: Recreation in IPNF varies by season. In the spring, summer, and fall, activities include use of recreational vehicles (ATVs, motorcycles), sight-seeing, wildlife viewing, hiking, mountain biking, horseback riding, camping, geo-caching, hunting, fishing, photography, and berry picking, while in the winter, activities include snowmobiling, cross-country skiing, snowshoeing, and trapping. Currently, recreational activities do not have much effect on caribou habitat, but can affect the use of the habitat by caribou through disturbance. The IPNF already consults with the Service on the southern Selkirk Mountains population of woodland caribou, so the incremental effect of the designation will involve including consideration of the potential for adverse modification of caribou habitat as part of each consultation. Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*), as amended, and following recent court decisions, Federal agencies are only required to evaluate the potential incremental impacts of rulemaking on those entities directly regulated by the rulemaking itself, and not the potential impacts to indirectly affected entities. The regulatory mechanism through which critical habitat protections are realized is section 7 of the Act, which requires Federal agencies, in consultation with the Service, to insure that any action authorized, funded, or carried by the Agency is not likely to adversely modify critical habitat. Therefore, only Federal action agencies are directly subject to the specific regulatory requirement (avoiding destruction and adverse modification) imposed by critical habitat designation. Under these circumstances, it is our position that only Federal action agencies will be directly regulated by this designation.

(73) *Comment:* The State of Idaho commented that: (1) Critical habitat designation prohibits adverse modification of critical habitat, a standard that is largely unmeasurable and unquantifiable; (2) all activities occurring on Federal, State, and private land designated as critical habitat that have a Federal nexus will have to go through additional and costly consultation with the Service to ensure that those activities are not impacting critical habitat for the southern Selkirk Mountains population of woodland caribou; (3) significant and costly changes associated with how land-use activities are authorized and carried out is anticipated with designation of critical habitat; and (4) they were concerned about future requirements to obtain a point-source NPDES permit for forest roads, or other as yet unknown Federal nexus situations created by further mandates.

Our Response: The following responses correspond to the comment numbers: (1) Caribou are habitat specialists, relying on boreal forest habitats for their survival. Therefore, due to the caribou's precarious population status and because the project-related impacts will most likely affect the persistence, development, and recycling of caribou habitat, we anticipate that the measures required to avoid adverse modification and those required to avoid jeopardy will, in most instances, be identical. Federal agencies have been consulting with the Service on the potential effects of proposed actions on the southern Selkirk Mountains population of woodland caribou since this population was emergency listed in 1983. Consultation, under the jeopardy standard, has been completed on these activities with nonjeopardy findings. Proposed projects have ranged from timber harvests and fuels management to recreational

development. We expect that, for a proposed action to result in jeopardy or adverse modification (in other words substantially reduce the conservation value of caribou habitat to such an extent that would affect its ability to serve its intended recovery role), it would likely have to significantly alter large areas of high-elevation mature to old-growth western hemlock/western red cedar climax forest or subalpine fir/Engelmann spruce climax forest, or restrict caribou movement through such areas. Therefore, similar to consultations completed under the jeopardy standard, we do not anticipate the proposal of any project at a scale that would adversely modify critical habitat. (2) As stated above, Federal agencies have been consulting with the Service on the potential effects of proposed actions on the southern Selkirk Mountains population of woodland caribou since this population was emergency listed in 1983. We do not anticipate the need to complete additional consultations for new projects proposed in areas designated as critical habitat that would not otherwise be subject to section 7 consultations. We acknowledge that there may be a few ongoing projects, for which consultation under the jeopardy standard has been completed, that consultation may need to be reinitiated to address critical habitat. However, we do not anticipate that the economic costs required to reinitiate consultation for ongoing projects will be significant. (3) For the above stated reasons, and because Federal agencies that manage land within the critical habitat area already take extensive measures to protect the caribou, we do not foresee or anticipate substantive changes in the existing management of caribou or its habitat. (4) We acknowledge that there exists some uncertainty as to how the recent court decision regarding the EPA administration of NPDES permits related to point-source discharges stemming from use of forest roads; however, we cannot project when, or if, changes to permitting for roads or other yet unknown situations may occur that would require additional section 7 consultation with Federal agencies such as the EPA, for activities on State lands. However, should this ruling stand, consultation on the species in occupied areas will be required under the regulations, regardless of the critical habitat designation.

(74) *Comment:* Bonner County commented that the level of economic impact on Bonner County and the Priest Lake Area was out of balance with the low probability that the southern Selkirk Mountains population of woodland caribou will inhabit the proposed critical habitat area in the future.

Our Response: There are no Bonner County or Priest Lake area lands being designated as critical habitat in the final designation.

Summary of Changes From Proposed Rule

As discussed previously in the Summary of Comments and Recommendations section, comments submitted by the peer reviewers, State of Idaho, Kootenai Tribe of Idaho, and others caused us to reexamine our analysis used to determine critical habitat in the proposed rule. As a result, we are designating critical habitat for the southern Selkirk Mountains population of woodland caribou on 30,010 ac (12,145 ha) of Federal land in Boundary County, Idaho, and Pend Oreille County, Washington. The final designation represents a reduction of approximately 345,552 ac (139,840 ha) from the critical habitat originally proposed for designation (76 FR 74018, November 30, 2011); and reflects a 1,000-ft (about 300-m) change in elevation from 4,000 ft (1,220 m) in the proposed rule, to an elevation at or above 5,000 ft (1,520 m), based on the results of population surveys since the time of listing and a seasonal habitat suitability model developed by Kinley and Apps (2007, entire) as discussed below. This reduction is primarily a function of: (1) Census monitoring documenting low numbers of individual caribou in the United States during annual surveys; (2) the proximity of the animals that have been observed in the United States to the U.S.-Canadian border; (3) the lack of long-term success of several herd augmentation efforts involving over 100 caribou from herds in British Columbia to recover the population in the United States; (4) information indicating that the recovery objectives identified in the 1994 recovery plan are outdated and need to be revised to reflect the current needs of this population; and (5) ongoing efforts in Canada to secure and manage habitat to conserve Selkirk Mountain caribou populations in British Columbia, each of which is discussed in more detail below.

There are four primary factors we considered in developing our final designation that resulted in this change from the proposed rule: (1) A revised determination of the geographical area occupied by the southern Selkirk Mountains population of woodland caribou at the time of listing based on comments we received, including those from peer reviewers, which caused us to reevaluate surveys conducted by Scott and Servheen (1984, 1985), as well as census monitoring documenting low numbers of individual caribou observed in the United States during annual surveys, (2) information and literature reporting the overall decline of the subspecies mountain caribou (*Rangifer tarandus caribou*) across its range, and in particular the decline of woodland caribou populations in the southern extent of their range, including the southern Selkirk Mountains population of woodland caribou; (3) information on areas currently conserved and managed for the conservation of woodland caribou in the Selkirk Mountains in British Columbia, Canada, including the status of the Canadian recovery actions for mountain caribou; and (4) the applicability as well as the status of the recovery objectives identified in the 1994 Selkirk Mountains Woodland Caribou Recovery Plan (USFWS 1994).

In developing our November 30, 2011 (76 FR 74018), proposed rule for critical habitat, our first step was to identify areas that provided for the conservation of the southern Selkirk Mountains population of woodland caribou within the geographical region described as the approximate area of normal utilization in the listing rule (49 FR 7390; February 29, 1984). This area of normal utilization included portions of the CNF in Washington and the IPNF in Idaho, and some Priest Lake Endowment Lands managed by the state of IDL. Critical habitat boundaries were identified at or above 4,000 ft (about 1,220 m) in elevation, which corresponds to the elevation above which the woodland caribou are generally known to occur within the southern Selkirk Mountains ecosystem in Idaho and Washington (Layser 1974, p. 25–26; USFWS 1994, p. 6; USFWS 2008a, p. 2). We then overlaid seasonal telemetry radiolocations collected from caribou that were translocated into the southern Selkirk Mountain ecosystems (British Columbia, Idaho, and Washington), from 1987 through 2004 by the IDFG, Washington Department of Fish and Wildlife, and the Fish and Wildlife Compensation Program (Columbia Basin) in British Columbia. To further refine the proposed critical habitat boundaries, we overlaid currently defined recovery area boundaries, caribou movement corridors mapped by the IPNF (USFS 2004, pp. 22–23), and results of the seasonal habitat suitability model developed by Kinley and Apps (2007, entire) for the southern Selkirk Mountains ecosystem. Isolated patches and some larger areas were removed

because they either lacked PCEs, were adjacent to Schweitzer ski resort, or had relatively low historical utilization based on telemetry data. We included certain areas below 4,000 ft (about 1,220 m) in elevation where seasonal connectivity between habitats was required.

After considering the peer reviewers' comments, we now consider studies conducted by Scott and Servheen (1984, 1985) to be the most definitive with regard to determining occupancy at the time the caribou was listed in 1983 (48 FR 1722). During their study in 1983–1984, which was conducted in the Selkirk Mountains in southeastern British Columbia, northern Idaho, and northeastern Washington, Scott and Servheen (1984, pp. 16–28) documented extensive use by caribou of habitat in British Columbia in drainages just north and adjacent to B.C. Highway 3. In contrast, they documented use of habitat in the United States by only two bull caribou located near Little Snowy Top and Upper Hughes Ridge in Idaho, and Sullivan Creek in Washington (p. 19). Caribou were not documented any further south within Washington or Idaho during the course of helicopter and ground tracking surveys. Consequently, we have determined that the area generally depicted in Scott and Servheen (1984, p. 27), adjusted for elevation and habitat based on the seasonal habitat suitability model developed by Kinley and Apps (2007, entire) for the southern Selkirk Mountains ecosystem, represents the best available scientific information regarding the geographical area occupied by the southern Selkirk Mountains population of woodland caribou at the time of listing. This is further supported by annual census surveys conducted by IDFG and Canada (DeGroot and Wakkinen, 2012), which have documented zero to four individual caribou observed only near the border within the United States from 2001 through 2012 (DeGroot and Wakkinen 2012, Table 2). This new analysis of which areas were occupied at the time of listing, which areas are documented to be occupied based on recent annual surveys, and which areas are essential to the conservation of the southern Selkirk Mountains population of woodland caribou greatly reduced the amount of area included in our final designation from our proposed rule.

We evaluated the area we now consider to have been occupied by the southern Selkirk Mountains population of woodland caribou at the time of listing, the results of population surveys, and the 1994 Selkirk Mountains Woodland Caribou Recovery Plan. We have determined that the recovery plan is outdated and no longer represents the best available science with regard to the essential conservation needs of the southern Selkirk Mountains population of woodland caribou, as was recognized in the 2008 5-year review of this population. Our 5-year review acknowledged that the recovery criteria no longer reflect the best available and most up-to-date information on the biology of the species and its habitat, and that since 1994, a great deal of information has been collected regarding the southern Selkirk Mountains population of woodland caribou and their habitat (USFWS 2008a, p. 15). When the population was listed, it consisted of 25–30 individuals, whose distribution centered primarily in British Columbia (Scott and Servheen 1985, p. 12). Between 1987 and 1990, the population was augmented with 60 animals from source herds in British Columbia, which were placed in Idaho. The 1994 recovery plan objectives center on maintaining an increasing population, securing and managing habitat, and establishing a third herd in Washington State using donor animals from British Columbia. Between 1996 and 1998, the population was augmented with 43 additional animals, some of which were placed in Washington, and some of which were placed north of the border. Although 103 caribou were translocated to the United States, none of the above augmentation efforts resulted in a long-term improvement in caribou distribution within the recovery area identified in the 1994 recovery plan. Rather, for reasons not fully understood, this population of caribou appears to be primarily dependent upon the availability of habitat in British Columbia, based on the results of annual population monitoring surveys (see Table 2).

TABLE 2—CARIBOU CENSUS INFORMATION, 1991 THROUGH 2012

[From USFS 2004, p. 7 and DeGroot and Wakkinen 2012, p. 12]

Year	Area	US—BC observations	Caribou total
1991	US	26	47
	BC	21	
1992	US	24	47
	BC	23	
1993	US	23	51
	BC	28	
1994	US	13	45
	BC	32	
1995	US	13(a)	52
	BC	39	
1996	US	12	39
	BC	27	
1997(b)	US	9	39
	BC	30	
1998(c)	US	31	45
	BC	14	
1999(d)	US	6	48
	BC	42	
2000	US	3	34
	BC	31	
2001	No census due to low snowpack		

TABLE 2—CARIBOU CENSUS INFORMATION, 1991 THROUGH 2012—Continued

[From USFS 2004, p. 7 and DeGroot and Wakkinen 2012, p. 12]

Year	Area	US—BC observations	Caribou total
2002	US	2	34
	BC	32	
2003	US	1	41(e)
	BC	40	
2004	US	3	33
	BC	30	
2005	US	2	35(f)
	BC	33	
2006	US	1	29–38
	BC	33	
2007	US	2	43–44
	BC	42 or 43	
2008(g)	US	3	46
	BC	43	
2009(g)	US	2	46
	BC	41	
2010(g)	US	2	43
	BC	41	
2011(g)	US	0	36
	BC	36	
2012(g)	US	4	27
	BC	27	

a—Known incomplete count (tracks of a small group [2–4] detected but animals not observed during helicopter flight.
b—Includes 19 animals released in 1996.
c—Includes 13 animals released in 1997.
d—Includes 11 animals released in 1998.
e—Likely some double counting and therefore not a reliable count.
f—Not a complete census. Must be considered a minimum count.
g—Combination fixed wing/helicopter survey.

This table reflects a significant decline in the number of caribou documented in the United States, other than in the years immediately following several augmentation efforts. Based on the best available information, the Service does not consider the extensive areas identified in the 1994 recovery plan to be essential to the conservation of the species.

In addition, the future availability of caribou from British Columbia herds for augmentation within the United States is questionable, given the significant declines in the British Columbia populations and overall lack of success of prior augmentation efforts (US GAO 1999, Appendix 4). Future recovery planning efforts will need to take into consideration the best available information, including that gained as a result of this final critical habitat designation. In accordance with section 4(f)(1) of the Act, the recovery plan will describe site-specific management actions needed for the conservation and survival of the southern Selkirk Mountains population of woodland caribou; identify objective and measureable recovery criteria; and estimate the time and costs required to carry out the measures identified in the recovery plan. Prior to the development of a revised recovery plan, the Service will request scientific information, as well as input from the public, tribes, Federal, State, and local agencies. There will also be an opportunity for public review and comment on a draft recovery plan prior to its final approval.

We reviewed the most recent literature describing the overall decline of the mountain ecotype of woodland caribou, of which the southern Selkirk Mountains population of woodland caribou is considered to be aligned based on their movement and feeding behavior (Cichowski *et al.,* 2004, pp. 235–236; Wittmer 2005, entire; USFWS 2008a, entire). Historically, woodland caribou were distributed throughout much of Canada and portions of the northern United States, where they were widespread and numerous when the first Europeans arrived in British Columbia (Spalding 2000, p. 40). Since that time, the overall geographical range for woodland caribou has been reduced, with most of the reduction occurring in the southern extent of its historical range (Spalding 2000, p. 40). By the 1990s, woodland caribou were considered one of the most critically endangered mammals in the world (U.S. GAO 1999, p. 5). It has been estimated that nearly 60 percent of the woodland caribou's historical range has been lost in western North America (Hatter pers. comm. in Spalding 2000, p. 40).

British Columbia contains three ecotypes of woodland caribou: the boreal caribou, the northern caribou, and the mountain caribou, of which the southern Selkirk Mountains population is part. For the mountain caribou ecotype, there has been a long-term population decline and range reduction in British Columbia (Siep and Cichowski 1996, p. 74), with one estimate that mountain caribou have been eliminated from as much as 43 percent of their historical range in British Columbia (MCTAC 2002, pp. v, 5). Most mountain caribou ecotype populations contain fewer than 100 individuals, and the majority of populations are declining (MCTAC 2002, p. 6; Wittmer *et al.* 2005, Table 2). Trends in populations are varied, but southern populations appear to be decreasing more rapidly than northern ones (Wittmer *et al.* 2005, p. 411). In one extreme example, the population estimate in the Purcell Mountains in southern British Columbia declined from over 60 individuals in 1995, to only 14 in 2009 (Kinley 2010, Figure 4).

In the United States, the sole remaining population of caribou is the southern Selkirk Mountains population of woodland caribou (US GAO 1999, p. 4; Cichowski 2010, Figure 1; Poole and

Mowat 2001, p. 2001). When the population was listed in 1983, it consisted of 25 to 30 animals, whose distribution centered primarily around Stagleap Provincial Park in British Columbia. As stated earlier, between 1987 and 1990, the population was augmented with 60 animals from source herds in British Columbia that were placed in the Idaho portion of the Selkirk ecosystem, and between 1996 and 1998, the population was augmented with 43 animals, some of which were placed in Washington, and some of which were placed just north of the border in British Columbia (USFWS 2008a, p. 15). As noted above in our occupancy discussion, surveys from 2001 through 2010, have indicated that most individuals of this population were observed in British Columbia (DeGroot and Wakkinen 2012, Table 2). This information also comports with the earlier Scott and Servheen reports on caribou ecology (1984, 1985), which state, ''as the number of U.S. sightings declined since the early 1970s, concern has mounted that caribou may be abandoning the U.S. portion of their range.''

Our reassessment of the best available information at this point in time leads us to conclude that the majority of habitat essential to the conservation of the southern Selkirk Mountains population of woodland caribou occurs in British Columbia, Canada, and that although the U.S. portion of the habitat used by the caribou makes an essential contribution to the conservation of the species, habitat on the U.S. side of the border is not independently capable of conserving the species to the extent anticipated at the time the 1994 recovery plan was developed. The geographical area that provides the PBFs essential to the conservation of the species, therefore, spans the border, and most of it lies in Canada. Since we can only designate critical habitat within the United States (50 CFR 424.12(h)), we are designating those areas within the United States that we consider to have been occupied at the time of listing, as described above, and that provide the PBFs essential to the conservation of the species.

The 1994 Selkirk Mountains Woodland Caribou Recovery Plan (USFWS 1994) recommended that an area of approximately 443,000 ac (179,000 ha) would be needed to support a recovered population of the southern Selkirk Mountains population of woodland caribou in the Selkirks (p. 31). It further states that the conservation of these habitats is an important element of caribou recovery, and that research will better define these habitats (p. 31). Prior to the 1987 translocation effort, a study on the population characteristics of the southern Selkirk Mountains population of woodland caribou was initiated that provided background stating, ''Concern has mounted in recent years that caribou many be abandoning the United States portion of their range * * * '' (Scott and Servheen 1984, p. 16). Other than the geographical areas Scott and Servheen (1984) identified in their study that were occupied at the time of listing, the recovery areas identified in the 1994 recovery plan are not being utilized by caribou. Many of those areas listed in the recovery plan were, and continue to be, USFS lands managed for the southern Selkirk Mountains population of caribou, and contain one or more of the PBFs identified in this rule. However, for reasons not fully understood, this population of woodland caribou continues to make greater use of habitat in Canada than would be predicted, based on the availability of habitat in the United States as identified in the Kinley and Apps (2007) modeling study. Consequently, we no longer find the extensive areas initially identified for the recovery of the woodland caribou population within the United States to be essential to the conservation of the species.

We have determined that an area of approximately 30,010 ac (12,145 ha) within the United States was occupied by the southern Selkirk Mountains population of woodland caribou at the time of listing and provides the PBFs essential to the conservation of the species, and which may require special management considerations or protection. This area therefore meets the definition of critical habitat for the southern Selkirk Mountains population of woodland caribou. We also assessed the total area of lands likely needed by the southern Selkirk Mountains population of the woodland caribou, without regard to international boundaries. We determined that the 30,010 ac (12,145 ha) at an elevation of 5,000 ft (1,520 m) and above designated as critical habitat within the Selkirk Mountains in the United States, combined with the amount of habitat protected and managed for woodland caribou within Canada, meets the amount of habitat recommended to be secured and enhanced in the 1994 Recovery Plan (443,000 ac, 179,000 ha) to support a recovered population (USFWS 1994, pp. 28, 30–31). Currently, Canada has protected 282,515 ac (114,330 ha) of Crown Lands from further timber harvest within the Selkirk Mountains to support woodland caribou conservation (DeGroot, pers. comm. 2012). The Nature Conservancy of Canada also recently purchased approximately 135,908 ac (55,000 ha) of the former Darkwoods property located within the Selkirk Mountains in British Columbia, and halted all logging activities in woodland caribou habitat (The Nature Conservancy of Canada 2011, p. 4; DeGroot pers. comm. 2012). These Nature Conservancy lands are essentially surrounded by the protected Crown Lands described above. Thus, adding the designation of 30,010 ac (12,145 ha) of critical habitat in the United States to the habitats currently protected and conserved for woodland caribou in Canada provides approximately 448,443 ac (181,478 ha) of habitat protected within the Selkirk Mountains for woodland caribou conservation. Additionally, areas in the United States designated as critical habitat for the species are immediately adjacent with, and contiguous to, the Crown Lands protected in Canada for woodland caribou conservation. The protection of these connected habitats in the United States and British Columbia will facilitate continued woodland caribou movement and seasonal habitat use and other behaviors that this population currently and historically exhibited.

Therefore, on the basis of this reevaluation of the best available data and the information provided in the 1994 Recovery Plan for the Selkirk Mountains Woodland Caribou, we are designating 30,011 ac (12,145 ha) at an elevation of 5,000 ft (1,520 m) and above, on Federal lands in Boundary County, Idaho, and Pend Oreille County, Washington, as critical habitat for the southern Selkirk Mountains population of woodland caribou in the United States. This area represents our best assessment of the area occupied by the species at the time of listing in 1983 that provides the PBFs essential to the conservation of the species. This area, when combined with areas secured and protected for the conservation of the species in British Columbia, meets the area requirements recommended in the original recovery plan for the species. Although the recovery plan, as written, envisioned that more of the recovery area for the species would fall within the United States, the best scientific information available indicates that the range of the southern Selkirk Mountains population of woodland caribou has largely shifted northward, and that the vast majority of the areas that provide the essential habitats for this population of woodland caribou now occurs within

Canada. As stated earlier, multiple efforts to augment the existing woodland caribou population with more than 100 animals from source herds in British Columbia between 1987 and 1990, and 1996 and 1998, have not resulted in any long-term improvement in caribou distribution throughout the southern Selkirk Mountains. The number of woodland caribou detected in the United States has continued to dwindle and annual census surveys continue to find the majority of the remaining population occupying habitats in British Columbia. Due to what appears to be an ongoing range contraction of the woodland caribou population from the southern extent of its former range, and the overall decline of the mountain ecotype of woodland caribou in British Columbia, in particular the more southern populations, we have determined that there are no areas within the United States outside the geographical area occupied at the time of listing that are essential to the conservation of the species.

An additional change from our proposed rule was the refinement in our description of PCE 1 to more accurately reflect the seasonal habitats utilized by the southern Selkirk Mountains population of woodland caribou. This refinement did not affect the amount of acreage designated for critical habitat. In addition, we broadened our description of essential habitats for PCE 2 to include high-elevation basins, as well as ridgetops that are at or above 6,000 ft (1,830 m)—regardless of snowpack level, since pregnant females from the southern Selkirk Mountains population of woodland caribou were reported to prefer alpine habitats at all scales irrespective of forested conditions. These changes are discussed in the Primary Constituent Elements (PCEs) below, and in the *Physical or Biological Features* section. The PCEs presented in the proposed rule (76 FR 74081) were revised based on peer review and public comments, and information received in response to the proposed critical habitat designation. A more detailed discussion of the factors we used to identify critical habitat for this final rule can be found in the ''Criteria Used to Identify Critical Habitat.''

Critical Habitat

Background

Critical habitat is defined in section 3 of the Act as:

(1) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the Act, on which are found those physical or biological features

(a) Essential to the conservation of the species and

(b) Which may require special management considerations or protection; and

(2) Specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Conservation, as defined under section 3 of the Act, means to use and the use of all methods and procedures that are necessary to bring an endangered or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Critical habitat receives protection under section 7 of the Act through the requirement that Federal agencies ensure, in consultation with the Service, that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by non-Federal landowners. Where a landowner requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat, the consultation requirements of section 7(a)(2) of the Act would apply, but even in the event of a destruction or adverse modification finding, the obligation of the Federal action agency and the landowner is not to restore or recover the species, but to implement reasonable and prudent alternatives to avoid destruction or adverse modification of critical habitat.

Under the first prong of the Act's definition of critical habitat, areas within the geographical area occupied by the species at the time it was listed are included in a critical habitat designation if they contain those physical and biological features (PBFs) (1) which are essential to the conservation of the species and (2) which may require special management considerations or protection. For these areas, critical habitat designations are defined by, to the extent known using the best scientific and commercial data available, those PBFs that are essential to the conservation of the species (such as space, food, cover, and protected habitat). In identifying those physical and biological features, we focus on the principal biological or physical constituent elements (primary constituent elements such as roost sites, nesting grounds, seasonal wetlands, water quality, tide, soil type) that are essential to the conservation of the species. Primary constituent elements are the elements of PBFs that provide for a species' specific life-history processes and are essential to the conservation of the species.

Under the second prong of the Act's definition of critical habitat, we can designate critical habitat in areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. For example, an area currently occupied by the species but that was not occupied at the time of listing may be essential to the conservation of the species and may be included in the critical habitat designation. We designate critical habitat in areas outside the geographical area occupied by a species only when a designation limited to its range would be inadequate to ensure the conservation of the species.

Section 4 of the Act requires that we designate critical habitat based on the best scientific and commercial data available. Further, our Policy on Information Standards Under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658)), and our associated Information Quality Guidelines, provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we are determining which areas should be designated as critical habitat, our primary source of information is

generally the information developed during the listing process for the species. Additional information sources may include the recovery plan for the species, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, biological assessments, other unpublished materials, or experts' opinions or personal knowledge.

Habitat is dynamic, and species may move from one area to another over time. Climate change will be a particular challenge for biodiversity because the interaction of additional stressors associated with climate change and current stressors may push species beyond their ability to survive (Lovejoy 2005, pp. 325–326). The synergistic implications of climate change and habitat fragmentation are the most threatening facet of climate change for biodiversity (Hannah *et al.* 2005, p.4). Current climate change predictions for terrestrial areas in the Northern Hemisphere indicate warmer air temperatures, more intense precipitation events, and increased summer continental drying (Field *et al.* 1999, pp. 1–3; Hayhoe *et al.* 2004, p. 12422; Cayan *et al.* 2005, p. 6; Intergovernmental Panel on Climate Change (IPCC) 2007, p. 1181). Climate change may lead to increased frequency and duration of severe storms and droughts (Golladay *et al.* 2004, p. 504; McLaughlin *et al.* 2002, p. 6074; Cook *et al.* 2004, p. 1015).

The information currently available on the effects of global climate change and increasing temperatures does not make sufficiently precise estimates of the location and magnitude of the effects. Nor are we currently aware of any climate change information specific to the habitat of the southern Selkirk Mountains population of woodland caribou that would indicate what areas might become important to the species in the future. Therefore, as explained in the proposed rule (76 FR 74028), we are unable to determine what additional areas, if any, may be appropriate to include in the final critical habitat for this species to address the effects of climate change.

We recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not be needed for recovery of the species. Areas that are important to the conservation of the species, both inside and outside the critical habitat designation, will continue to be subject to: (1) Conservation actions implemented under section 7(a)(1) of the Act, (2) regulatory protections afforded by the requirement in section 7(a)(2) of the Act for Federal agencies to insure their actions are not likely to jeopardize the continued existence of any endangered or threatened species, and (3) the prohibitions of section 9 of the Act if actions occurring in these areas may affect the species. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. These protections and conservation tools will continue to contribute to recovery of this species. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans (HCPs), or other species conservation planning efforts if new information available at the time of these planning efforts calls for a different outcome.

The protections of the Act, and the need to consult on Federal activities (or projects where there is a Federal nexus) apply when a proposed Federal action may directly or indirectly affect a listed species and/or designated critical habitat. For the southern Selkirk Mountains population of woodland caribou, the area occupied by the species at the time of emergency listing in 1983, which serves as the basis for this determination of critical habitat, is not the same as the area that may currently be occupied by the species (50 CFR 424.02). For example, we have anecdotal, but unconfirmed, reports of live and dead caribou, tracks, and shed antlers within the United States portion of the recovery area described in the 1994 recovery plan, from 2000 through 2008 (USFWS 2008b, pp. 86–87), which have been reported during all seasons and in both Washington and Idaho. Our standard under section 4(b)(2) is to apply the best available scientific data available when identifying areas that meet the definition of critical habitat (*e.g.,* areas that are essential to the conservation of the species). We do not find anecdotal reports of caribou sightings satisfies this standard, and they have not been considered for purposes of this final critical habitat designation.

Physical or Biological Features

In accordance with section 3(5)(A)(i) and 4(b)(1)(A) of the Act and regulations at 50 CFR 424.12, in determining which areas within the geographical area occupied by the species at the time of listing to designate as critical habitat, we consider the PBFs that are essential to the conservation of the species and which may require special management considerations or protection. These include, but are not limited to:

(1) Space for individual and population growth and for normal behavior;

(2) Food, water, air, light, minerals, or other nutritional or physiological requirements;

(3) Cover or shelter;

(4) Sites for breeding, reproduction, or rearing (or development) of offspring; and

(5) Habitats that are protected from disturbance or are representative of the historical, geographical, and ecological distributions of a species.

We derive the specific PBFs essential for the southern Selkirk Mountains population of woodland caribou from studies of this species' habitat, ecology, and life history as described in the Critical Habitat section of the proposed rule to designate critical habitat published in the **Federal Register** on November 30, 2011 (76 FR 74018), and in the information presented below. Additional information can be found in the final listing rule published in the **Federal Register** on February 26, 1984 (49 FR 7390) and the 1994 Revised Recovery Plan for the Selkirk Mountains Woodland Caribou, and the Southern Selkirk Mountains Caribou Population 5-Year Review completed by the Service on December 2, 2008 (USFWS 2008a). We have determined that the southern Selkirk Mountains population of woodland caribou requires the following physical or biological features:

Space for Individual and Population Growth and for Normal Behavior

The southern Selkirk Mountains population of woodland caribou requires large contiguous areas of high-elevation coniferous forest summer and winter habitat, with little or no vehicle access and disturbance, so the caribou can spread out at low densities (*i.e.,* 30–50 caribou/250,000 ac (100,000 ha)) and avoid predators (Seip and Cichowski 1996, p. 79; Stevenson *et al.* 2001, p. 1). Mountain caribou strongly prefer old-growth forests to young forests in all seasons (Stevenson *et al.* 2001, p. 1).

The primary long-term threat to the southern Selkirk Mountains population of woodland caribou is the ongoing loss and fragmentation of contiguous old-growth forests and forest habitats due to a combination of timber harvest, wildfires, and road development. The

effects associated with habitat loss and fragmentation are: (1) Reduction of the amount of space available for caribou, limiting the ecological carrying capacity; (2) reduction of the arboreal lichen supply, affecting the caribou's key winter food source; (3) potential impacts to caribou movement patterns; (4) potential effects to the caribou's use of remaining fragmented habitat because suitable habitat parcels will be smaller and discontinuous; and (5) increased susceptibility of caribou to predation as available habitat is compressed and fragmented (Stevenson *et al.* 2001, p. 10; MCTAC 2002, pp. 20–22; Cichowski *et al.* 2004, pp. 242; Apps and McLellan 2006, pp. 92–93; Wittmer *et al.* 2007, pp. 576–577).

Forest management practices have been one of the greatest concerns for caribou habitat management since the mid-1970s (Stevenson *et al.* 2001, p. 1; MCTAC 2002, p. 17; British Columbia 2004, p. 242). Improved road access, developments in log processing that resulted in better utilization of smaller trees, suitable sites for conducting summer logging, and other forest product demands have increased interest in some areas of caribou winter ranges for timber harvesting (Cichowski *et al.* 2004, p. 242). Timber harvest has moved into high-elevation mature and old growth forest habitat types due to more roads and more powerful machinery capable of traversing difficult terrains (Stevenson *et al.* 2001, p. 10). Timber harvesting can reduce and fragment areas creating a patchwork of different age classes of forest stands of the caribou's preferred old-growth lichen-bearing forests. While this multi-aged class forest patchwork may contain sufficient lichens to support a caribou herd, it also likely increases caribou predation in the southern Selkirk ecosystem (Stevenson *et al.* 2001, p. 1). Patchwork forest habitats provide suitable habitat for other ungulates such as moose (*Alces alces*), elk (*Cervus elaphus*), and deer (*Odocoileus* spp.) into close proximity with caribou, and consequently support increased number of predators, including mountain lions (*Felis concolor*), wolves (*Canis lupus*), coyotes (*Canis latrans*), wolverines (*Gulo gulo luscus*), black bears (*Ursus americanus*), and grizzly bears (*Ursus arctos*) (Seip and Cichowski 1996, p. 79; Wittmer *et al.* 2005, pp. 414–417).

The southern mountain ecotype of woodland caribou, of which the southern Selkirk Mountains population belongs, prefers high-elevation (over 5,000 ft (1,520 m)) mature to old-growth coniferous forests to limit the effects of predation by spreading out over these large, contiguous areas at high elevations that other ungulate species avoid (Seip and Cichowski 1996, p. 79; MCTAC 2002, pp. 20–21; Cichowski *et al.* 2004, p. 230–231; Kinley and Woods 2006, entire). Residing on large contiguous forest areas, caribou are unprofitable prey (*i.e.,* it is not worth a predator's energy investment to seek out prey when there are so few animals in a large area, which is often in deep snow). To adequately provide for their habitat needs throughout the four seasons of a year, large contiguous areas of mature to old-growth western hemlock/western red cedar forests and subalpine fir and Engelmann spruce forests, and the connecting habitat in-between, are required. In order for the southern Selkirk Mountains population of woodland caribou to be able to use these areas, the habitats need to be connected, particularly during winter when the energy costs of moving through deep snow can be high (Stevenson *et al.* 2001, p. 15).

Food, Water, Air, Light, Minerals, or Other Nutritional or Physiological Requirements

Arboreal hair lichens are a critical winter food for the southern Selkirk Mountains population of woodland caribou diet, which is composed almost entirely of lichens from November to May (Servheen and Lyon 1989, p. 235; Stevenson *et al.* 2001, p. 1; USFS 2004, p. 18), when lichens represent the only primary food source available (Paquet 1997, p. 13). Lichens are pulled from the branches of conifers, picked from the surface of the snow after being blown out of trees by wind, or are grazed from wind-thrown branches and trees. The two kinds of lichens commonly eaten by the southern Selkirk Mountains population of woodland caribou are *Bryoria* spp. and *Alectoria sarmentosa;* both are most commonly found in high-elevation climax forests on old trees (Paquet 1997, p. 14). These lichens are extremely slow growing, and are typically abundant only in mature or old growth forests (Paquet 1997, p. 2). Relative humidity, wetting and drying cycles, and amount of light are ultimately the controlling factors of lichen growth.

During the spring (MCTAC 2002, p. 11), the southern Selkirk Mountains population of woodland caribou moves to lower elevations where snow has melted, to forage on new green vegetation (Paquet 1997, p. 16). In summer months, the southern Selkirk Mountains population of woodland caribou moves back to mid- and upper-elevation spruce/alpine fir forests (Paquet 1997, p. 16). Summer diets include selective foraging of grasses, flowering plants, horsetails, willow and dwarf birch leaves and tips, sedges, lichens (Paquet 1997, pp. 13, 16), and huckleberry leaves (USFS 2004, p. 18). The fall and early winter diet consists largely of dried grasses, sedges, willow and dwarf birch tips, and arboreal lichens.

Sites for Breeding, Reproduction, or Rearing (or Development) of Offspring

In spring (April 20–July 7), the southern Selkirk Mountains population of woodland caribou moves to areas with green vegetation, which becomes the primary food source. These areas often overlap with early and late winter ranges at elevations where new, green vegetation is appearing (Servheen and Lyon 1989, p. 235; MCTAC 2002, p. 11), which allows the animals to recover from the effects of winter (USFWS 1994, p. 7). Pregnant females will move to these spring habitats for forage, but during the calving season from June 1 to July 7, the need to avoid predators influences habitat selection. Areas selected for calving are typically high-elevation, alpine and nonforested areas in close proximity to old-growth forest ridgetops, as well as high-elevation basins that can be food limited, but are more likely to be predator free (USFWS 1994, p. 8; MCTAC 2002, p. 11; Cichowski *et al.* 2004, p. 232, Kinley and Apps 2007, p. 16). Arboreal lichen becomes the primary food source for pregnant females and females with calves, since green forage is unavailable in these secluded and high-elevation habitats.

Habitats That Are Protected From Disturbance or Are Representative of the Historical, Geographical, and Ecological Distributions of a Species

In general, seasonal habitats of the southern Selkirk Mountains population of woodland caribou consist of: (1) Five seasons (early winter, late winter, spring, calving, and summer) (Kinley and Apps 2007, p. 7); and (2) habitats primarily within two vegetation zones (*i.e.,* western hemlock/western red cedar and subalpine fir/Engelmann spruce forests) (USFS 2004, p. 18; USFWS 2008a, p. 20). Early winter is a period of rapid snow accumulation and generally extends from October 17 to January 18 (Kinley and Apps, p. 7). Kinley and Apps (2007, p. 15) reported that during this time caribou in the southern Selkirk Mountains ecosystem are often associated with landscapes dominated by spruce and subalpine fir stands with a forest canopy closure of at least 26–50 percent; and preferred habitats were strongly related to old forests. At a fine scale analysis, a study

by Scott and Servheen (1984, p. 30) that involved ground-tracking six radio-collared caribou from the southern Selkirk Mountains population of woodland caribou reported that habitat selection during early winter seemed to be stand conditions that minimized snow depth with dense canopies of 76–100 percent in old-growth western hemlock/cedar forests with large, lichen-bearing branches. Scott and Servheen (1984, p. 36) reported that the primary selection factor was for habitat types providing snow-free-foraging areas around trees with dense canopy covers at elevations approximately 4,950 feet (1,509 m) and below.

Caribou seek out these more closed-canopy timber stands where they feed on a combination of lichen on wind-thrown trees, and lichens that have fallen from standing trees (litterfall) (MCTAC 2002, p. 10). If available, shrubs and other forbs that remain accessible in snow wells under large trees are also consumed. A conifer canopy that intercepts snow and allows access to feeding sites is important (MCTAC 2002, p. 10) until the snowpack consolidates and the caribou can move to higher elevations (USFS 2004, p. 18). However, these elevational shifts can be quite variable within and between years, depending on snow levels (Apps *et al.* 2001, p. 67; Kinley *et al.* 2007; p. 94). All mountain caribou experience the poorest mobility and food availability of any season during early winter because of the typically deep, soft snow (MCTAC 2002, p. 10).

Late winter generally starts around January 19 and extends to about April 19 (Kinley and Apps, 2007 p. 7). During this time, the snowpack is deep (up to 16 ft (5 m) on ridgetops), and firm enough to support the animal's weight, which allows easier movement. These upper slopes and ridge tops are: (1) Generally higher in elevation; (2) support mature to old stands of subalpine fir and Engelmann spruce; (3) have canopies similar to early winter habitat (generally 26 to 50 percent cover) (Kinley and Apps, 2007, p. 15); and (4) have high levels of arboreal lichen (USFWS 1994, p. 6; MCTAC 2002, p. 10; USFS 2004, p. 18; USFWS 2008a, p. 20).

Increasing levels of winter recreational activities (*e.g.,* snowmobiling) within the southern Selkirk Mountains population of woodland caribou recovery area, which includes the CNF in Washington and IPNF in Idaho, is an emerging threat to the southern Selkirk Mountains population of woodland caribou. The numbers and distribution of recreational snowmobilers has increased over the last 10–15 years, due in part to improved snowmobile technology and the increasing popularity of the sport. Snowmobiling activities have the potential to displace caribou from suitable habitat, resulting in additional energy expenditure by caribou when they vacate an area to avoid disturbance (Tyler 1991, p. 191; Cichowski *et al.* 2004, p. 241). This results in an effective loss of habitat availability temporarily, and potentially for the long term if caribou abandon areas characterized by chronic disturbance.

Spring is usually from around April 20 to July 7 (Kinley and Apps 2007, p. 7), when caribou move to areas that have green vegetation to recover from the effects of winter (Servheen and Lyon 1989, p. 235; USFWS 1994, p. 7). July to around October 16 is considered the summer habitat season for caribou. During both seasons, Kinley and Apps (2007, p. 15) report the southern Selkirk Mountains population of woodland caribou is associated with spruce and subalpine fir that also provides thermal cover, although summer habitat is in higher elevations with a preference for valleys (Kinley and Apps 2007, p. 15), and habitat with high forage availability (USFWS 1994, p. 8). In the Selkirk Mountains, the shallow slopes used in late summer are characteristically high-elevation benches, secondary stream bottoms and riparian areas, and seeps where forage is lush and abundant (Servheen and Lyon 1989, p. 236).

In the fall (generally October 17 into November (Kinley and Apps 2007, p. 7)), the southern Selkirk Mountains population of woodland caribou may gradually move to western hemlock dominated forests as the availability of forage vegetation such as vascular plants disappears. It is during this time of year when the southern Selkirk Mountains population of woodland caribou is making the transition from green forage to arboreal lichens (Servheen and Lyon, 1989, p. 236). As winter nears, the annual cycle of habitat use by the southern Selkirk Mountains population of woodland caribou repeats.

Primary Constituent Elements for the Southern Selkirk Mountains Population of Woodland Caribou

Under the Act and its implementing regulations, we are required to identify the physical and biological features essential to the conservation of the southern Selkirk Mountains population of woodland caribou in areas occupied at the time of listing, focusing on the features' primary constituent elements. Primary constituent elements are those specific elements of the PBFs that provide for a species' specific life-history processes and are essential to the conservation of the species.

Based on our current knowledge of the PBFs and habitat characteristics required to sustain the southern Selkirk Mountains population of woodland caribou's life-history processes, we determine that the primary constituent elements specific to the southern Selkirk Mountains population of woodland caribou are:

i. Mature to old-growth western hemlock (*Tsuga heterophylla*)/western red cedar (*Thuja plicata*) climax forest, and subalpine fir (*Abies lasiocarpa*)/Engelmann spruce (*Picea engelmanni*) climax forest at least 5,000 ft (1,520 m) in elevation; these habitats typically have 26–50 percent or greater canopy closure.

ii. Ridge tops and high-elevation basins that are generally 6,000 ft (1,830 m) in elevation or higher, associated with mature to old stands of subalpine fir (*Abies lasiocarpa*)/Engelmann spruce (*Picea engelmanni*) climax forest, with relatively open (approximately 50 percent) canopy.

iii. Presence of arboreal hair lichens.

iv. High-elevation benches and shallow slopes, secondary stream bottoms, riparian areas, and seeps, and subalpine meadows with succulent forbs and grasses, flowering plants, horsetails, willow, huckleberry, dwarf birch, sedges and lichens. The southern Selkirk Mountains population of woodland caribou, including pregnant females, use these areas for feeding during the spring and summer seasons.

v. Corridors/Transition zones that connect the habitats described above. If human activities occur, they are such that they do not impair the ability of caribou to use these areas.

The PBFs for the southern Selkirk Mountains population of woodland caribou are, therefore, the arrangement of the above habitat types and their components and transition zones on the landscape in a manner that supports seasonal movement, feeding, breeding, and sheltering needs. Each of the seasonal use areas creates space on the landscape that allows caribou to spread out and avoid predators. These areas also have little or no disturbance from forest practices, roads, or recreational activities.

With this designation of critical habitat, we define the PBFs essential to the conservation of the species, through the identification of the features' primary constituent elements sufficient to support the life-history processes of the species.

Special Management Considerations or Protections

When designating critical habitat, we assess whether the specific areas within the geographical area occupied by the species at the time of listing contain features that are essential to the conservation of the species and which may require special management considerations or protection.

A comprehensive discussion of the threats affecting the species is included in the southern Selkirk Mountains Caribou Population 5-Year Review (USFWS 2008a), the Idaho Comprehensive Wildlife Conservation Strategy (2005), and the Revised Selkirk Mountains Woodland Caribou Recovery Plan (USFWS 1994). The features essential to the conservation of the southern Selkirk Mountains population of woodland caribou, described above, may require special management considerations or protections to reduce the following threats: Habitat fragmentation of contiguous old-growth forests due to forest management practices and activities, wildfire, disturbances such as roads and recreation, and altered predator/prey dynamics.

Special management considerations or protection are required within critical habitat areas to address these threats. Management activities that could ameliorate these threats include, but are not limited to, conservation measures and actions to minimize the effects of forest management practices on the PBFs, actions to minimize the potential for wildfire and the implementation of rapid-response measures, as appropriate, when wildfire occurs, road and recreational area closures as appropriate to avoid or minimize the potential for disturbance-related impacts, and reducing opportunities for predator-caribou interactions.

The United States-Canada border in the Selkirk Mountains is remote, rugged, and permeable to the southern Selkirk Mountains population of woodland caribou. Illegal border-related activities and resultant law enforcement response (such as increased human presence, and vehicles including trucks, motorcycles, and all-terrain-vehicles), has the potential to cause adverse effects in these remote areas. While current levels of law enforcement activity do not pose a threat, a substantial increase in activity levels could be of concern. We note that some level of law enforcement activity can be beneficial, as it decreases illegal traffic. Significant increases in illegal cross-border activities in the designated critical habitat areas could pose a threat to the southern Selkirk Mountains population of woodland caribou, and therefore, to a degree, border security actions provide a beneficial decrease in cross-border violations and their impacts. There are no known plans to construct security fences in the designated critical habitat. We do not anticipate impermeable fencing being built in areas with rugged terrain. Technological solutions and other tactics for Homeland Security purposes would be more likely to be applied in these areas.

Existing Conservation Measures

Land and resource management plans (LRMPs) for the IPNF and CNF have been revised to incorporate management objectives and standards to address the above threats, as a result of section 7 consultation between the USFWS and USFS (USFWS 2001a, b). Standards for caribou habitat management have been incorporated into the IPNF's 1987 and CNF's 1988 LRMP, respectively, to avoid the likelihood of jeopardizing the continued existence of the species, contribute to caribou conservation, and ensure consideration of the biological needs of the species during forest management planning and implementation actions (USFS 1987, pp. II–6, II–27, Appendix N; USFS 1988, pp. 4–10–17, 4–38, 4–42, 4–73–76, Appendix I).

These efforts contribute to the protection of the essential PBFs by: (1) Retaining mature to old-growth cedar/hemlock and subalpine spruce/fir stands; (2) analyzing timber management actions on a site-specific basis to consider potential impacts to caribou habitat; (3) avoiding road construction through mature old-growth forest stands unless no other reasonable access is available; (4) placing emphasis on road closures and habitat mitigation based on caribou seasonal habitat needs and requirements; (5) controlling wildfires within southern Selkirk Mountains population of woodland caribou management areas to prevent loss of coniferous species in all size classes; and (6) managing winter recreation in the CNF in Washington, with specific attention to snowmobile use within the Newport/Sullivan Lake Ranger District.

Criteria Used To Identify Critical Habitat

As required by section 4(b)(1)(A) of the Act, we used the best scientific and commercial data available to designate critical habitat. We reviewed available information pertaining to the habitat requirements of this species. In accordance with the Act and its implementing regulation at 50 CFR 424.12(e), we considered whether designating additional areas—outside those currently occupied as well as those occupied at the time of listing—are necessary to ensure the conservation of the species. We are designating critical habitat in areas within the geographical area occupied by the species at the time of emergency listing in 1983 (48 FR 1722; January 14, 1983). Information we used to inform this designation includes:

(1) The emergency listing rule (48 FR 1722; January 14, 1983);

(2) The final listing rule (49 FR 7390; February 29, 1984);

(3) The 1985 Management/Recovery Plan for Selkirk Caribou (USFWS 1985) and appendices;

(4) The Revised Recovery Plan for the Selkirk Mountains Woodland Caribou (USFWS 1994);

(5) The Southern Selkirk Mountains Caribou Population 5-Year Review (USFWS 2008a);

(6) The Biological Opinion and Conference Opinion for the Modified Idaho Roadless Rule for USDA Forest Service Regions 1 and 4 (USFWS 2008b);

(7) Biological opinions for the continued implementation of both the Colville National Forest and Idaho Panhandle National Forest Land and Resource Management Plans (USFWS 2001a, b);

(8) Site-specific reports including seasonal habitat models and movement corridor for the southern Selkirk Mountain Woodland Caribou (Kinley and Apps 2007, entire; Wakkinen and Slone 2010, entire);

(9) The Idaho Comprehensive Wildlife Conservation Strategy (2005);

(10) Research published in peer-reviewed articles, academic theses, agency reports, and mapping information from U.S. and Canadian sources;

(11) Peer review and public comments in response to the proposed critical habitat designation; and

(12) The telemetry database compiled by Kinley for the Idaho Department of Lands Critical Habitat Modeling for the South Selkirk Ecosystem (Kinley and Apps 2007) Habitat Suitability Model (HSM) analysis (referred to hereafter as ''telemetry'').

This database incorporated 17 years (1987–2004) of telemetry location coordinates from 117 animals of the southern Selkirk Mountains population of woodland caribou. Telemetry data was collected by the IDFG, Washington Department of Fish and Wildlife, and the Fish and Wildlife Compensation Program (Columbia Basin) in British Columbia, and was used to assess

utilization of the habitats considered for the final critical habitat designation. We also used regional Geographic Information System (GIS) data (such as species occurrence data, land use, elevation, topography, aerial imagery, and land ownership maps) for area calculations and mapping.

In the proposed critical habitat rule (76 FR 74028; November 30, 2011), we identified areas that provide for the conservation of the southern Selkirk Mountains population of woodland caribou based on the geographical area described as the approximate area of normal utilization in the emergency listing rule (48 FR 1722; January 14, 1983) and final listing rule (49 FR 7390; February 29, 1984). The approximate area of normal utilization encompassed approximately 2,396,500 ac (969,829 ha) in both Canada and the United States; 1,405,000 ac (568,583 ha) of which was located within the United States, and included northeast Washington and northern Idaho. Lands managed by the CNF in Washington, the IPNF in Idaho, and some Priest Lake Endowment Lands managed by IDL were included within the boundary of the approximate area of normal utilization described in the above listing rules. In the proposed critical habitat rule, critical habitat boundaries were identified at or above 4,000 ft (about 1,220 m) in elevation, which corresponded to the elevation of the recovery area established in the State of Washington, but is below the 4,500 ft (1,370 m) recovery area established for the State of Idaho. We then overlaid seasonal telemetry radiolocations collected from caribou that were translocated into the southern Selkirk Mountain ecosystems (British Columbia, Idaho, and Washington), from 1987 through 2004 by the IDFG, Washington Department of Fish and Wildlife, and the Fish and Wildlife Compensation Program (Columbia Basin) in British Columbia. To further refine the proposed critical habitat boundaries, we overlaid caribou movement corridors mapped by the IPNF (USFS 2004, pp. 22–23), and results of the seasonal habitat suitability model developed by Kinley and Apps (2007, entire) for the southern Selkirk Mountains ecosystem. Isolated patches and some larger areas were removed because they either lacked PCEs, were adjacent to Schweitzer ski resort, or had relatively low historical utilization based on telemetry data. We included certain areas below the 4,000 ft (about 1,220 m) in elevation where seasonal connectivity between habitats was required. The resulting area encompassed 345,552 ac (139,840 ha), as depicted in the proposed critical habitat rule published on November 30, 2011 (76 FR 74028).

Comments by the Kootenai Tribe, State of Idaho, peer reviewers and other parties suggested methods to refine the proposed critical habitat boundary, including a Habitat Suitability Model (HSM) by Kinley and Apps (2007), and a Migratory Corridor Study (MCS) by Wakkinen and Slone (2010). The HSM was developed to determine the relative quality of an area in terms of the five seasonal habitats that caribou could utilize (early winter, late winter, spring, calving, summer), and is a scale-dependent habitat model for the southern Selkirk Mountains population of woodland caribou. This model is based upon peer-reviewed methodology and has been utilized for 16 other subpopulations of mountain woodland caribou in Canada (Kinley and Apps 2007, p. 23 and Apps *et al.* 2001, entire). Areas were scored from 0 to 1 for each season, based on the probability that the area provided good caribou habitat (Kinley and Apps 2007, p.16). Service GIS staff aggregated the five seasonal GIS layers into one layer keeping the highest score at every location. This output was then filtered to only show areas with a score greater than or equal to 0.5, as HSM scores greater than or equal to 0.5 gave the best prediction of suitable habitat for the southern Selkirk Mountains population of woodland caribou (Kinley and Apps 2007, p16). This filtered layer was used in all of our analysis incorporating HSM.

We assessed various scenarios using the aggregate HSM to show habitat quality captured, and the telemetry points from Kinley and Apps (2007) to infer utilization by caribou. Only HSM areas with a score greater than or equal to 0.5 were considered when assessing scenarios. Acreage and percentage differences between scenarios were made in GIS using the proposed critical habitat (76 FR 74018) as the baseline. For reference purposes, the total HSM greater than or equal to 0.5 within the United States in the final critical habitat rule is 22,178 ac (8,975 ha), and was 151,825 ac (61,441 ha) in the proposed critical habitat rule.

The Kootenai Tribe of Idaho recommended using areas with an HSM score greater than or equal to 0.5 with a minimum patch size of 40 ac (16 ha), combined with the MCS corridors for connectivity. The tribe suggested that areas outside the proposed critical habitat boundary should be included, and that the IPNF's caribou suitable habitat layer (PNF–SH) should be used for assessing suitable habitat. The tribe incorporated an analysis of efficiency of habitat designation based on the percentage of telemetry points or habitat within the proposed critical habitat and their suggested habitat's area. By definition, this scenario captures a very high proportion of high-ranking habitat (99 percent of the HSM greater than or equal to 0.5, and 93 percent of telemetry points). We reviewed this scenario and observed that it did not provide for inter-patch movement. The MCS corridors provided regional connectivity, but 40 patches of habitat remained that were not connected. We also concluded that the HSM was a better measure of habitat quality than PNF–SH. This was because there was limited information available on the PNF–SH model, and the utilization of the HSM for identifying critical habitat was cited by other peer reviewers and commenters, unlike the PNF–SH model.

The State of Idaho and Idaho Department of Fish and Game suggested utilizing the Priority 1 subset of the HSM developed by Kinley and Apps (2007), connected by the MCS corridors with a score greater than or equal to 35, to identify critical habitat. We determined that the HSM Priority 1 areas were inadequate since combined with the suggested corridors, they included only the 63 percent of telemetry points and 39 percent of HSM greater than or equal to 0.5. Also, as Kinley and Apps state (p. 24) the ''locations important for caribou conservation may not be entirely circumscribed by Priority 1, 2 and 3 areas''.

Peer reviewers made a number of suggestions regarding the use of elevation in the delineation of critical habitat. Two peer reviewers suggested elevations above 5,000 ft (1,520 m) should be included, and one identified 4,500 ft (1,370 m) as being important for early winter habitat. The HSM scores, Wakkinen and Slone's corridors, and work by Freddy (1974, 1979) were also forwarded for consideration, with a suggestion that more recent data be incorporated into a new modeling effort. The Kinley and Apps (2007) analysis of telemetry data for defining seasonal cut-dates indicated a mean elevation of approximately 5,500 ft (1,675 m) for the early-winter seasonal-habitat period, which represent the time of year when the southern Selkirk Mountains population of woodland caribou are typically found at the lowest elevation (Kinley and Apps 2007, pp. 7–8). The telemetry database utilized in their analysis indicates that approximately 88 percent of early-winter telemetry data occurred above 5,000 ft (1,520 m), with approximately 71 percent of points occurring above 5,500 ft (1,680 m)

(Wakkinen peer review 2012, p. 3; State of Idaho comment letter 2012, p. 8; Kootenai Tribe comment letter 2012, p. 8). Approximately 94 percent of all the telemetry data (for all seasonal habitat periods) occurred above 5,000 ft (1,520 m) in elevation.

Based on the Kinley and Apps (2007, entire) telemetry database analysis, and after considering all peer review and public comments and information received in response to the proposed critical habitat designation, we revised the critical habitat elevation boundaries from 4,000 ft (1,120 m) in the proposed critical habitat rule to habitats at and above 5,000 ft (1,520 m) elevation in the final rule. We acknowledge one peer reviewer's comment recommending that the designation of critical habitat for the southern Selkirk Mountains population of woodland caribou be at 4,500 ft (1,370 m) elevation. However, the information we evaluated as well as comments received indicate that only habitats at 5,000 ft (1,520 m) in elevation and above are essential to caribou. Our revised designation of areas at and above 5,000 ft (1,520 m) also captures the ecotone described by Art Zack, USFS (pers comm. 2012; see Summary of Comments and Recommendations section), where the cedar/hemlock and subalpine fir habitat types meet or intergrade on the IPNF at approximately 5,100 ft (1,550 m); although where the ecotone break occurs is based on aspect, topography, landform, cold air drainage patterns, and local weather patterns. Similarly, the designation in our final rule includes the average elevational shifts in habitat use by caribou, by season, for the south Selkirk ecosystem (Kinley and Apps 2007, p.3). This elevational range of 5,496 ft (1,675 m) in November (early winter) to about 6,300 ft (1,920 m) in late January (late winter) was based on telemetry data collected from 1987–2004. Scott and Servheen (1984, p. 30) also reported that in early winter the southern Selkirk Mountains population of woodland caribou sought out habitat types providing snow-free foraging areas at elevations approximately 4,950 ft (1,509 m). After considering the best scientific data available, as required under section 4(B)(2) of the Act, we have determined that the areas described by the primary constituent elements and therefore the essential physical and biological features specific to the southern Selkirk Mountains population of woodland caribou above are essential to the conservation of the species.

When determining proposed critical habitat boundaries, we made every effort to avoid including developed areas such as lands covered by buildings, pavement, and other structures because such lands lack PBFs for the southern Selkirk Mountains population of woodland caribou. The scale of the maps we prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such developed lands. Any such lands inadvertently left inside critical habitat boundaries shown on the maps of this final rule have been excluded by text in the rule and are not designated as critical habitat. Therefore, a Federal action involving these lands will not trigger section 7 consultation with respect to critical habitat and the requirement of no adverse modification, unless the specific action would affect the PBFs in the adjacent critical habitat.

The critical habitat designation is defined by the map presented at the end of this document in the rule portion. We include more detailed information on the boundaries of the critical habitat designation in the preamble of this document. We will make the coordinates or plot points or both on which the map is based available to the public on *http://www.regulations.gov* at Docket No. FWS–R1–ES–2011–0096, on our Internet site *http://www.fws.gov/idaho/SpeciesNews.htm,* and at the field office responsible for the designation (see **FOR FURTHER INFORMATION CONTACT** above).

We are designating as critical habitat lands that we have determined are occupied at the time of listing and contain sufficient PBFs to support life-history processes essential for the conservation of the southern Selkirk Mountains population of woodland caribou.

According to Freddy (1974, p. 43), current and historical observations suggest seasonal movement of caribou into the United States most likely during October and November, with return movement into British Columbia from March through June. He also stated that from September 1971 through May 1972, there were several observations of caribou or tracks in the United States, especially in the east spur of the Selkirk Mountains (Freddy 1974, pp. 45–46). An early May 1983 census of probable caribou habitat in British Columbia, Idaho, and Washington revealed a population of 26 animals, including 4 mature bulls, 3 immature bulls, 3 calves, 11 cows, and 5 animals that were either young bulls or cows (IDFG 1983, pers. comm.). A 1983–1984 seasonal distribution study based on telemetry data from six collared caribou concluded that most activity occurred in drainages north of British Columbia Highway 3 (Scott and Servheen 1984, pp. 16–22). In that study, three adult cows, two mature bulls, and one immature bull, were tracked. Of these six caribou, the two mature bulls were collared with radio transmitters during October 1983 (*i.e.,* data from the spring season was not available), the immature bull was illegally killed in the fall of 1983, and a radio collar on one of the adult cows stopped transmitting in the spring of 1984.

Although this study does provide information on occupancy of caribou at the time of listing it does not provide an in-depth understanding of seasonal habitat use within this area at the time of listing. The telemetry data of this study are incomplete, as two of the six caribou collared were no longer transmitting location information, and there are no telemetry data from the majority of the population (*i.e.,* the caribou that were not radio collared). Other than the location information obtained during the augmentation of the southern Selkirk Mountains population of woodland caribou during the 1980s and 1990s, caribou census surveys conducted annually since the early 1990s have been limited to the winter season, when caribou and their tracks are most visible. As stated earlier, Freddy (1974, pp. 43, 45–46), suggested that current and historical use of habitat within the United States occurred throughout most of the year. Although we do not have conclusive data regarding current seasonal use patterns in the area being designated as critical habitat (because year-round surveys are not being conducted), the areas have at minimum been used during winter and other seasons historically, and are essential to the conservation of the southern Selkirk Mountains population of woodland caribou for these purposes.

One unit was designated based on sufficient elements of PBFs being present to support the southern Selkirk Mountains population of woodland caribou life processes. Some areas within the unit contain all of the identified elements of the PBFs and support multiple life processes. Some areas within the unit contain only some elements of the PBFs necessary to support the southern Selkirk Mountains population of woodland caribou's particular use of that habitat.

Final Critical Habitat Designation

We are designating one unit as critical habitat for the southern Selkirk Mountains population of woodland caribou. The critical habitat area described below constitutes our best assessment of areas that meet the definition of critical habitat for the southern Selkirk Mountains population

of woodland caribou. The Selkirk Mountains Critical Habitat Unit is located in Boundary County, Idaho, and Pend Oreille County, Washington. The approximate size and ownership of the Selkirk Mountains Critical Habitat Unit is identified in Table 1. This Unit was occupied at the time of emergency listing in 1983, and at the time of final listing in 1984, and is essential to the conservation of the species.

TABLE 3—DESIGNATED CRITICAL HABITAT FOR THE SOUTHERN SELKIRK MOUNTAINS POPULATION OF WOODLAND CARIBOU

[Area estimates reflect all land within critical habitat unit boundaries, values are rounded to the nearest whole numbers.]

Critical habitat by county	Land ownership by type and acres (hectares)			
	Federal	Private	State	Total
SELKIRK MOUNTAINS CRITICAL HABITAT UNIT Southern Selkirk Mountains Woodland Caribou (*Rangifer tarandus caribou*)				
Boundary County, Idaho	6,029 (2,440)	0	0	6,029 (2,440)
Pend Oreille County, Washington	23,980 (9,705)	0	0	23,980 (9,705)
Unit Total	30,010 (12,145)	0	0	30,010 (12,145)

Note: Totals may not sum due to rounding.

We present a brief description of the Selkirk Mountains Critical Habitat Unit, and reasons why this Unit meets the definition of critical habitat for the southern Selkirk Mountains population of woodland caribou.

Selkirk Mountains Critical Habitat Unit

The Selkirk Mountains Critical Habitat Unit consists of 30,010 ac (12,145 ha) in Boundary County, Idaho and Pend Oreille County, Washington. Lands within this unit are at 5,000 ft (1,520 m) and higher in elevation. These lands are under Federal ownership, within the Colville and Idaho Panhandle National Forests. The Selkirk Mountains Critical Habitat Unit was occupied at the time of both the emergency listing on January 14, 1983 (48 FR 1722), and the final listing in 1984 (49 FR 7390; February 29, 1984), and is essential to the conservation of the species. This area also contains the PBFs essential to the conservation of the southern Selkirk Mountains population of woodland caribou and which may require special management considerations or protection. The primary land uses are forest management activities and recreational activities, which occur throughout the year. Recreational activities include, but are not limited to, snowmobiling, off-highway vehicle (OHV) use, backcountry skiing, and hunting. Special management considerations or protection needed within the unit are required to address habitat fragmentation of contiguous old growth forests due to forest practices and activities, wildfire, and disturbances such as roads and recreation.

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that any action they fund, authorize, or carry out is not likely to jeopardize the continued existence of any endangered or threatened species, or result in the destruction or adverse modification of designated critical habitat of such species. In addition, section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any action which is likely to jeopardize the continued existence of any species proposed to be listed under the Act or result in the destruction or adverse modification of proposed critical habitat.

Decisions by the 5th and 9th Circuit Courts of Appeals have invalidated our regulatory definition of ''destruction or adverse modification'' (50 CFR 402.02) (see *Gifford Pinchot Task Force* v. *U.S. Fish and Wildlife Service,* 378 F. 3d 1059 (9th Cir. 2004) and *Sierra Club* v. *U.S. Fish and Wildlife Service et al.,* 245 F.3d 434, 442 (5th Cir. 2001)), and we do not rely on this regulatory definition when analyzing whether an action is likely to destroy or adversely modify critical habitat. Under the statutory provisions of the Act, we determine destruction or adverse modification on the basis of whether, with implementation of the proposed Federal action, the affected critical habitat would continue to serve its intended conservation role for the species.

If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Examples of actions that are subject to the section 7 consultation process are actions on State, tribal, local, or private lands that require a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit from the Service under section 10 of the Act) or that involve some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency). Federal actions not affecting listed species or critical habitat, and actions on State, tribal, local, or private lands that are not federally funded or authorized, do not require section 7 consultation.

As a result of section 7 consultation, we document compliance with the requirements of section 7(a)(2) through our issuance of:

(1) A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or

(2) A biological opinion for Federal actions that may affect, or are likely to adversely affect, listed species or critical habitat.

When we issue a biological opinion concluding that a project is likely to jeopardize the continued existence of a listed species and/or destroy or adversely modify critical habitat, we provide reasonable and prudent alternatives to the project, if any are identifiable, that would avoid the likelihood of jeopardy and/or destruction or adverse modification of critical habitat. We define ''reasonable and prudent alternatives'' (at 50 CFR 402.02) as alternative actions identified during consultation that:

(1) Can be implemented in a manner consistent with the intended purpose of the action,

(2) Can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction,

(3) Are economically and technologically feasible, and

(4) Would, in the Director's opinion, avoid the likelihood of jeopardizing the continued existence of the listed species and/or avoid the likelihood of destroying or adversely modifying critical habitat.

Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where we have listed a new species or subsequently designated critical habitat that may be affected and the Federal agency has retained discretionary involvement or control over the action (or the agency's discretionary involvement or control is authorized by law). Consequently, Federal agencies sometimes may need to request reinitiation of consultation with us on actions for which formal consultation has been completed, if those actions with discretionary involvement or control may affect subsequently listed species or designated critical habitat.

Application of the ''Adverse Modification'' Standard

The key factor related to the adverse modification determination is whether, with implementation of the proposed Federal action, the affected critical habitat would continue to serve its intended conservation role for the species. Activities that may destroy or adversely modify critical habitat are those that alter the PBFs to an extent that appreciably reduces the conservation value of the critical habitat for the southern Selkirk Mountains population of woodland caribou. As discussed above, the role of critical habitat is to support life-history needs of the species and provide for the conservation of the species.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe, in any proposed or final regulation that designates critical habitat, activities involving a Federal action that may destroy or adversely modify such habitat, or that may be affected by such designation.

We have identified no specific projects that would be of such scope and magnitude as to destroy or adversely modify critical habitat. However, activities that may affect critical habitat, when carried out, funded, or authorized by a Federal agency, should result in consultation for the southern Selkirk Mountains population of woodland caribou, and thus comply with the Act. These activities include, but are not limited to:

(1) Actions that would reduce or remove mature old-growth vegetation (greater than 100–125 years old) within the cedar/hemlock zone and subalpine fir/Engelmann spruce zone at higher elevations stands (at or greater than 5,000 ft (1,520 m)), including the ecotone between these two forest habitats. Such activities could include, but are not limited to, forest stand thinning, timber harvest, and fuels treatment of forest stands. These activities could significantly reduce the abundance of arboreal lichen habitat, such that the landscape's ability to produce adequate densities of arboreal lichen to support persistent mountain caribou populations is at least temporarily diminished.

(2) Actions that would cause permanent loss or conversion of old-growth coniferous forest on a scale proportionate to the large landscape used by the southern Selkirk Mountains population of woodland caribou. Such activities could include, but are not limited to, recreational area developments, certain types of mining activities (*e.g.* open-pit mining), and road construction. Such activities could eliminate and fragment mountain caribou and arboreal lichen habitat.

(3) Actions that would increase traffic volume and speed on roads within southern Selkirk Mountains population of woodland caribou critical habitat areas. Such activities could include, but are not limited to, transportation projects to upgrade roads or development, or development of a new tourist destination. These activities could reduce connectivity within the old-growth coniferous forest landscape for mountain caribou.

(4) Actions that would increase recreation in southern Selkirk Mountains population of woodland caribou critical habitat. Such activities could include, but are not limited to, recreational developments that facilitate winter access into mountain caribou habitat units, or management activities that increase recreational activities within designated critical habitat throughout the year, such as snowmobiling, OHV use, and backcountry skiing. These activities have the potential to displace the southern Selkirk Mountains population of woodland caribou from suitable habitat or increase their susceptibility to predation. Displacement of caribou may result in: (1) Additional energy expenditure when they vacate an area to avoid disturbance, at a time when their energy reserves are already low; (2) an effective temporary loss of available habitat; and (3) potential long-term habitat loss if they abandon areas affected by chronic disturbance.

The southern Selkirk Mountains population of woodland caribou strongly prefers old-growth forests to young forests in all seasons. In designated critical habitat, management actions that alter vegetation structure or condition in young forests over limited areas may not represent an adverse effect to caribou critical habitat. However, an adverse effect could result if these types of management activities reduce and fragment areas in a manner that creates a patchwork of different age classes or prevents young forests from achieving old-growth habitat characteristics. For example, a commercial thinning or fuels reduction project in a young forest that may affect, but would not be likely to adversely affect critical habitat would not require formal consultation. However, a commercial thinning or fuels reduction project conducted within an old-growth forest that may affect, and would be likely to adversely affect, critical habitat would require formal consultation. As discussed in response to Comment 60, Federal agencies should examine the scale of their activities to determine whether direct or indirect alteration of habitat would occur to an extent that the value of critical habitat for the conservation of the mountain caribou would be appreciably diminished.

Actions with no effect on the PCEs and physical and biological features of critical habitat for the southern Selkirk Mountains population of woodland caribou do not require section 7 consultation, although such actions may still have adverse or beneficial effects on the species itself that require consultation. Examples of these actions may include: routine trail and road maintenance (using native aggregate, blading of forest road surfaces, dust abatement), resource surveys such as timber stand exams, limited recreation on established trails and dispersed sites, and routine border security and surveillance. Although each of these activities would not be likely to result in adverse effects or adverse modifications to critical habitat for the southern Selkirk Mountains population of woodland caribou, they may require section 7 consultation to insure they are not likely to jeopardize the continued existence of the species.

Section 9(a)(1) of the Act identifies prohibited activities with regard to endangered wildlife species listed pursuant to section 4 of the Act, which includes unlawful ''take.'' Section 3(19) of the Act defines ''take'' to mean to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. Harm in the definition of ''take'' in the Act means an act which actually kills or injures fish or wildlife. Such an act may include significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including breeding, spawning, rearing, migrating, feeding, or sheltering (46 FR 54750; November 4, 1981). Therefore, the southern Selkirk Mountains population of woodland caribou is protected by the Act both within and outside of designated critical habitat areas. Outside of designated critical habitat, the Service will continue to work with our Federal partners to conserve the southern Selkirk Mountains population of woodland caribou pursuant to sections 7(a)(1) and 7(a)(2) of the Act.

Exemptions

Application of Section 4(a)(3) of the Act

The Sikes Act Improvement Act of 1997 (Sikes Act) (16 U.S.C. 670a) required each military installation that includes land and water suitable for the conservation and management of natural resources to complete an integrated natural resources management plan (INRMP) by November 17, 2001. An INRMP integrates implementation of the military mission of the installation with stewardship of the natural resources found on the base. Each INRMP includes:

(1) An assessment of the ecological needs on the installation, including the need to provide for the conservation of listed species;

(2) A statement of goals and priorities;

(3) A detailed description of management actions to be implemented to provide for these ecological needs; and

(4) A monitoring and adaptive management plan.

Among other things, each INRMP must, to the extent appropriate and applicable, provide for fish and wildlife management; fish and wildlife habitat enhancement or modification; wetland protection, enhancement, and restoration where necessary to support fish and wildlife; and enforcement of applicable natural resource laws.

The National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136) amended the Act to limit areas eligible for designation as critical habitat. Specifically, section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)) now provides: ''The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.''

There are no Department of Defense lands with a completed INRMP within the proposed critical habitat designation. Therefore, we are not exempting lands from this final designation of critical habitat for the southern Selkirk Mountains population of woodland caribou pursuant to section 4(a)(3)(B)(i) of the Act.

Exclusions

Application of Section 4(b)(2) of the Act

Section 4(b)(2) of the Act states that the Secretary must designate and revise critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. The statute on its face, as well as the legislative history, is clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor in making that determination.

Under section 4(b)(2) of the Act, the Secretary may exclude an area from designated critical habitat based on economic impacts, impacts on national security, or any other relevant impacts. In considering whether to exclude a particular area from the designation, we identify the benefits of including the area in the designation, identify the benefits of excluding the area from the designation, and evaluate whether the benefits of exclusion outweigh the benefits of inclusion. If the analysis indicates that the benefits of exclusion outweigh the benefits of inclusion, the Secretary may exercise his discretion to exclude the area only if such exclusion would not result in the extinction of the species.

Exclusions Based on Economic Impacts

Under section 4(b)(2) of the Act, we consider the economic impacts of specifying any particular area as critical habitat. In order to consider economic impacts, we prepared a DEA of the proposed critical habitat designation and related factors (Industrial Economics, 2012). The draft economic analysis, dated May 2, 2012, was made available for public review from May 31 through July 2, 2012 (77 FR 32075). Following the close of the comment period, a final economic analysis (FEA), of the potential economic effects of the designation was developed, taking into consideration the public comments and new information.

The intent of the FEA is to quantify the economic impacts of all potential conservation efforts for the southern Selkirk Mountains population of woodland caribou; some of these costs will likely be incurred regardless of whether we designate critical habitat (baseline). The economic impact of the final critical habitat designation is analyzed by comparing scenarios both ''with critical habitat'' and ''without critical habitat.'' The ''without critical habitat'' scenario represents the baseline for the analysis, considering protections already in place for the species (*e.g.,* under the Federal listing and other Federal, State, and local regulations). The baseline, therefore, represents the costs incurred regardless of whether critical habitat is designated. The ''with critical habitat'' scenario describes the incremental impacts associated specifically with the designation of critical habitat for the species. The incremental conservation efforts and associated impacts are those not expected to occur absent the designation of critical habitat for the species. In other words, the incremental costs are those attributable solely to the designation of critical habitat above and beyond the baseline costs; these are the costs we consider in the final designation of critical habitat. The analysis looks retrospectively at baseline impacts incurred since the species was listed, and forecasts both baseline and incremental impacts likely to occur with the designation of critical habitat.

The proposed rule that was published on November 30, 2011 (76 FR 74018) identified approximately 375,562 acres (151,985 hectares) as critical habitat in Boundary and Bonner Counties in Idaho, and Pend Orielle County in

Washington. The proposed designation included 222,971 ac (90,233 ha) of Federal land, 65,218 ac (26,393 ha) of State land, and 15,379 ac (6,223 ha) of private land in Bonner and Boundary Counties, Idaho, and 71,976 ac (29,128 ha) of Federal land in Pend Orielle County, Washington. The final rule removes approximately 345,552 ac (139,603 ha) that do not meet the definition of critical habitat under section 3(5)(A) of the Act. The final rule designates approximately 30,010 acres (12,145 hectares) of critical habitat on Federal lands within the Colville National Forest and Salmo-Priest Wilderness Area in Pend Oreille County, Washington, and the Idaho Panhandle (Kaniksu) National Forest in Boundary County, Idaho. The areas being designated are within the geographical area occupied by the species at the time of listing, are essential to the conservation of the species, and are managed by the U.S. Forest Service.

Incremental impacts resulting from the designation of critical habitat for the southern Selkirk Mountains population of woodland caribou are limited to the additional effort required to address adverse modification in consultations undertaken by USFS in the IPNF and CNF. The FEA forecasts about one formal and informal section 7 consultation annually over the next 20 years. The 20-year timeframe applied in the economic analysis is chosen as the Office of Management and Budget (OMB) indicates that a standard time period of analysis is 10 to 20 years, and rarely exceeds 50 years. This analysis does not forecast additional project modifications associated with this designation. The reasonably foreseeable incremental impacts quantified in this analysis and attributable to the critical habitat designation are limited to the administrative costs of considering adverse modification during section 7 consultation with the Service. The potential incremental administrative costs resulting from the critical habitat designation are as follows:

(1) Idaho Panhandle National Forest: $135,000 from 2012 to 2031, or $11,900 annually, discounted at seven percent.

(2) Colville National Forest and Salmo-Priest Wilderness Area: $105,000 from 2012 to 2031, or $9,230 annually, discounted at seven percent.

(3) Other Federal agencies: $6,400 from 2012 to 2031, or $564 annually, discounted at seven percent (U.S. Environmental Protection Agency, U.S. Army Corps of Engineers, U.S. Customs and Border Protection).

(4) Project Modifications: Due to extensive baseline protections of the caribou, no incremental project modifications are anticipated.

The FEA also addresses how potential economic impacts are likely to be distributed, including an assessment of any local or regional impacts of habitat conservation and the potential effects of conservation activities on government agencies, private businesses, and individuals. The FEA measures lost economic efficiency primarily associated with timber harvests; fire, fire suppression, forest management practices; and recreational activities and development. Decision-makers can use this information to assess whether the effects of the designation might unduly burden a particular group or economic sector. Finally, the FEA looks retrospectively at costs that have been incurred since 1984 (the year of the final listing rule) (49 FR 7390; February 29, 1984), and considers costs that may occur in the 20 years following the designation of critical habitat, which was determined to be the appropriate period for analysis because limited planning information was available for most activities to forecast activity levels for projects beyond a 20-year timeframe.

In summary, the incremental effects of the designated critical habitat for caribou are limited by the relatively large overlap the designation has with the existing habitat-based consultation framework for actions having already undergone section 7 consultations for the effects to the species under the jeopardy standard. The FEA did not identify any disproportionate incremental costs that are likely to result from the designation. Consequently, the Secretary is not exercising his discretion to exclude any areas from this designation of critical habitat for the southern Selkirk Mountains population of woodland caribou based on economic impacts.

A copy of the FEA with supporting documents may be obtained by contacting the Idaho Fish and Wildlife Office (see **ADDRESSES**) or by downloading from the Internet at *http://www.regulations.gov* (search for docket number FWS–R1–ES–2011–0096).

Exclusions Based on National Security Impacts

Under section 4(b)(2) of the Act, we consider whether there are lands owned or managed by the Department of Defense (DOD) where a national security impact might exist. In preparing this final rule, we have determined that the lands within the designation of critical habitat for the southern Selkirk Mountains population of woodland caribou are not owned or managed by the Department of Defense, and, therefore, we anticipate no impact on national security. U.S. Customs and Border Protection (CBP) is tasked with maintaining National Security interests along the nation's international borders. As such, CBP activities may qualify for exclusions under section 4(b)(2) of the Act. CBP has not identified specific areas within the designated critical habitat that should be considered for exclusion at this time. Since neither DOD nor CBP have identified areas within the designated critical habitat for exclusion, the Secretary is not exercising his discretion to exclude any areas from this final designation based on impacts on national security.

Exclusions Based on Other Relevant Impacts

Under section 4(b)(2) of the Act, we consider any other relevant impacts, in addition to economic impacts and impacts to national security. We consider a number of factors including whether the landowners have developed any HCPs or other management plans for the area, or whether there are conservation partnerships that would be encouraged by designation of, or exclusion from, critical habitat. In addition, we look at any tribal issues, and consider the government-to-government relationship of the United States with tribal entities. We also consider any social impacts that might occur because of the designation.

In preparing this final rule, we have determined that there are currently no HCPs or other non-federal management plans for the southern Selkirk Mountains population of woodland caribou. Although the final designation does not include any tribal lands, it includes fish, wildlife, and other natural and cultural resources of the tribes, including rights reserved under treaty and other laws, policies, and orders. Similarly, the designation of critical habitat for the southern Selkirk Mountains population of woodland caribou does not establish any closures, or restrictions on use or access to areas designated as critical habitat, including those areas reserved by the tribes. We anticipate no impact on tribal lands, partnerships, or HCPs from this critical habitat designation. Accordingly, the Secretary is not exercising his discretion to exclude any areas from this final designation based on other relevant impacts.

Required Determinations

Regulatory Planning and Review—Executive Orders 12866 and 13563

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will review all significant rules. The OIRA has determined that this rule is not significant.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. Executive Order 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 (5 U.S.C. 801 *et seq.*), whenever an agency must publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities. In this final rule, we are certifying that the critical habitat designation for the southern Selkirk Mountains population of woodland caribou will not have a significant economic impact on a substantial number of small entities. The following discussion explains our rationale.

According to the Small Business Administration, small entities include small organizations, such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; as well as small businesses. Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than $5 million in annual sales, general and heavy construction businesses with less than $27.5 million in annual business, special trade contractors doing less than $11.5 million in annual business, and agricultural businesses with annual sales less than $750,000. To determine if potential economic impacts on these small entities are significant, we consider the types of activities that might trigger regulatory impacts under this rule, as well as the types of project modifications that may result. In general, the term ''significant economic impact'' is meant to apply to a typical small business firm's business operations.

To determine if the rule could significantly affect a substantial number of small entities, we consider the number of small entities affected within particular types of economic activities (*e.g.,* timber, recreation, and other activities). We apply the ''substantial number'' test individually to each industry to determine if certification is appropriate. However, the SBREFA does not explicitly define ''substantial number'' or ''significant economic impact.'' Consequently, to assess whether a ''substantial number'' of small entities is affected by this designation, this analysis considers the relative number of small entities likely to be impacted in an area. In some circumstances, especially with critical habitat designations of limited extent, we may aggregate across all industries and consider whether the total number of small entities affected is substantial. In estimating the number of small entities potentially affected, we also consider whether their activities have any Federal involvement.

Designation of critical habitat only affects activities authorized, funded, or carried out by Federal agencies. Some kinds of activities are unlikely to have any Federal involvement and so will not be affected by critical habitat designation. In areas where the species is present, Federal agencies already are required to consult with us under section 7 of the Act on activities they authorize, fund, or carry out that may affect the southern Selkirk Mountains population of woodland caribou. Federal agencies also must consult with us if their activities may affect critical habitat. Designation of critical habitat, therefore, could result in an additional economic impact on small entities due to the requirement to reinitiate consultation for ongoing Federal activities (see *Application of the ''Adverse Modification Standard''* section).

In our FEA of the critical habitat designation, we evaluated the potential economic effects on small business entities resulting from conservation actions related to the listing of the southern Selkirk Mountains population of woodland caribou and the designation of critical habitat. The analysis evaluates the potential for economic impacts related to: (1) Timber harvests; (2) Fire, fire suppression, and forest management practices; and (3) Recreational activities and development.

However, as stated earlier, the final rule removes approximately 345,552 ac (139,603 ha) that do not meet the definition of critical habitat under section 3(5)(A) of the Act (*i.e.,* the areas removed are not essential to the conservation of the species). The final rule designates approximately 30,010 acres (12,145 hectares) of critical habitat on Federal lands within the Colville National Forest and Salmo-Priest Wilderness Area in Pend Oreille County, Washington, and the Idaho Panhandle (Kaniksu) National Forest in Boundary County, Idaho. The areas being designated are within the geographical area occupied by the species at the time of listing, are essential to the conservation of the species, and managed by the U.S. Forest Service. As Federal agencies, the USFS, and U.S. Customs and Border Protection are not considered small entities. These Federal entities are expected to bear all of the incremental administrative costs of section 7 consultation and therefore, we do not anticipate small entities to be either directly regulated or significantly affected by this designation.

In summary, we considered whether this designation would result in a significant economic effect on a substantial number of small entities. Based on the above reasoning and currently available information, we concluded that this rule would not result in a significant economic impact on a substantial number of small entities. Therefore, we are certifying that the designation of critical habitat for the southern Selkirk Mountains population of woodland caribou will not have a significant economic impact on a

substantial number of small entities, and a regulatory flexibility analysis is not required.

Energy Supply, Distribution, or Use—Executive Order 13211

Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) requires agencies to prepare Statements of Energy Effects when undertaking certain actions. OMB has provided guidance for implementing this Executive Order that outlines nine outcomes that may constitute ''a significant adverse effect'' when compared to not taking the regulatory action under consideration.

The economic analysis finds that none of these criteria are relevant to this analysis. Thus, based on information in the FEA (Industrial Economics 2012, ES–8, Appendix A), energy-related impacts associated with the southern Selkirk Mountains population of woodland caribou conservation activities within critical habitat are not expected. As such, the designation of critical habitat is not expected to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we make the following findings:

(1) This rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or tribal governments, or the private sector, and includes both ''Federal intergovernmental mandates'' and ''Federal private sector mandates.'' These terms are defined in 2 U.S.C. 658(5)–(7). ''Federal intergovernmental mandate'' includes a regulation that ''would impose an enforceable duty upon State, local, or tribal governments'' with two exceptions. It excludes ''a condition of Federal assistance.'' It also excludes ''a duty arising from participation in a voluntary Federal program,'' unless the regulation ''relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority,'' if the provision would ''increase the stringency of conditions of assistance'' or ''place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding,'' and the State, local, or tribal governments ''lack authority'' to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; Aid to Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. ''Federal private sector mandate'' includes a regulation that ''would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program.''

The designation of critical habitat does not impose a legally binding duty on non-Federal Government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply, nor would critical habitat shift the costs of the large entitlement programs listed above onto State governments.

(2) We do not believe that this rule will significantly or uniquely affect small governments because it will not produce a Federal mandate of $100 million or greater in any year, that is, it is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act. The designation of critical habitat for the southern Selkirk Mountains population of woodland caribou occurs primarily on Federal land, and imposes no obligations on State or local governments. Consequently, we do not believe that the critical habitat designation would significantly or uniquely affect small government entities. As such, a Small Government Agency Plan is not required.

Takings—Executive Order 12630

In accordance with Executive Order 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we have analyzed the potential takings implications of designating critical habitat for the southern Selkirk Mountains population of woodland caribou in a takings implications assessment. The takings implications assessment concludes that this designation of critical habitat for the southern Selkirk Mountains population of woodland caribou does not pose significant takings implications for lands within or affected by the designation.

Federalism—Executive Order 13132

In accordance with Executive Order 13132 (Federalism), this rule does not have significant Federalism effects. A federalism impact summary statement is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of, this critical habitat designation with appropriate State resource agencies in Idaho. We received comments from the Idaho Office of Species Conservation that included comments from IDFG, IDL, and IDPR and have addressed them in the Summary of Comments and Recommendations section of the rule. The designation of critical habitat in areas currently occupied by the southern Selkirk Mountains population of woodland caribou imposes no additional restrictions to those currently in place and, therefore, has little incremental impact on State and local governments and their activities. The designation may have some benefit to these governments in that the areas that contain the PBFs essential to the conservation of the species are more clearly defined, and the elements of the features of the habitat necessary to the conservation of the species are specifically identified. This information does not alter where and what federally sponsored activities may occur. However, it may assist local governments in long-range planning (rather than having them wait for case-by-case section 7 consultations to occur).

Where State and local governments require approval or authorization from a Federal agency for actions that may affect critical habitat, consultation under section 7(a)(2) would be required. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of

critical habitat rests squarely on the Federal agency.

Civil Justice Reform—Executive Order 12988

In accordance with Executive Order 12988 (Civil Justice Reform), the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and that it meets the applicable standards set forth in sections 3(a) and 3(b)(2) of the Order. We are designating critical habitat in accordance with the provisions of the Act. To assist the public in understanding the habitat needs of the species, the rule identifies the elements of physical or biological features essential to the conservation of the southern Selkirk Mountains population of woodland caribou. The designated areas of critical habitat are presented on a map, and the rule provides several options for the interested public to obtain more detailed location information, if desired.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act (42 U.S.C. 4321 et seq.)

It is our position that, outside the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit, we do not need to prepare environmental analyses pursuant to the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*) in connection with designating critical habitat under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This position was upheld by the U.S. Court of Appeals for the Ninth Circuit (*Douglas County* v. *Babbitt,* 48 F.3d 1495 (9th Cir. 1995), cert. denied 516 U.S. 1042 (1996)).

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal—Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with tribes in developing programs for healthy ecosystems, to acknowledge that tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to tribes. We determined that there are no tribal lands occupied by the southern Selkirk Mountains population of woodland caribou at the time of listing that contain the features essential for conservation of the species, and no tribal lands unoccupied by the southern Selkirk Mountains population of woodland caribou that are essential for the conservation of the species. Therefore, we are not designating critical habitat for the southern Selkirk Mountains population of woodland caribou on tribal lands.

References Cited

A complete list of all references cited is available on the Internet at *http://www.regulations.gov* and upon request from the Idaho Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Author(s)

The primary authors of this rulemaking are the staff members of the Idaho Fish and Wildlife Office.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Regulation Promulgation

Accordingly, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—[AMENDED]

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

■ 2. In § 17.11(h), revise the entry for ''Caribou, woodland'' under ''Mammals'' in the List of Endangered and Threatened Wildlife to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
MAMMALS.							
*	*	*	*	*	*	*	
Caribou, woodland	*Rangifer tarandus caribou.*	Canada, U.S. (AK, ID, ME, MI, MN, MT, NH, VT, WA, WI).	Canada (southeastern British Columbia bounded by the Canada-U.S. border, Columbia River, Kootenay River, Kootenay Lake, and Kootenai River), U.S. (ID, WA).	E	128E, 136, 143	17.95(a)	NA
*	*	*	*	*	*	*	

■ 3. In § 17.95, amend paragraph (a) by adding an entry for ''Woodland caribou, (*Rangifer tarandus caribou)*, Southern Selkirk Mountains Population'' in the same alphabetical order that the species appears in the table at § 17.11(h), to read as follows:

§ 17.95 Critical habitat—fish and wildlife.

(a) Mammals.

* * * * *

Woodland Caribou (*Rangifer tarandus caribou*) Southern Selkirk Mountains Population

(1) A critical habitat unit is depicted for Boundary County, Idaho, and Pend Oreille County, Washington, on the map below.

(2) Within this area, the primary constituent elements of the physical and biological features essential to the conservation of the southern Selkirk Mountains population of woodland caribou consist of five components:

(i) Mature to old-growth western hemlock (*Tsuga heterophylla*)/western red cedar (*Thuja plicata*) climax forest, and subalpine fir (*Abies lasiocarpa*)/Engelmann spruce (*Picea engelmanni*) climax forest at least 5,000 ft (1,520 m) in elevation; these habitats typically have 26–50 percent or greater canopy closure.

(ii) Ridge tops and high elevation basins that are generally 6,000 ft (1,830 m) in elevation or higher, associated with mature to old stands of subalpine fir (*Abies lasiocarpa*)/Engelmann spruce (*Picea engelmanni*) climax forest, with relatively open canopy.

(iii) Presence of arboreal hair lichens.

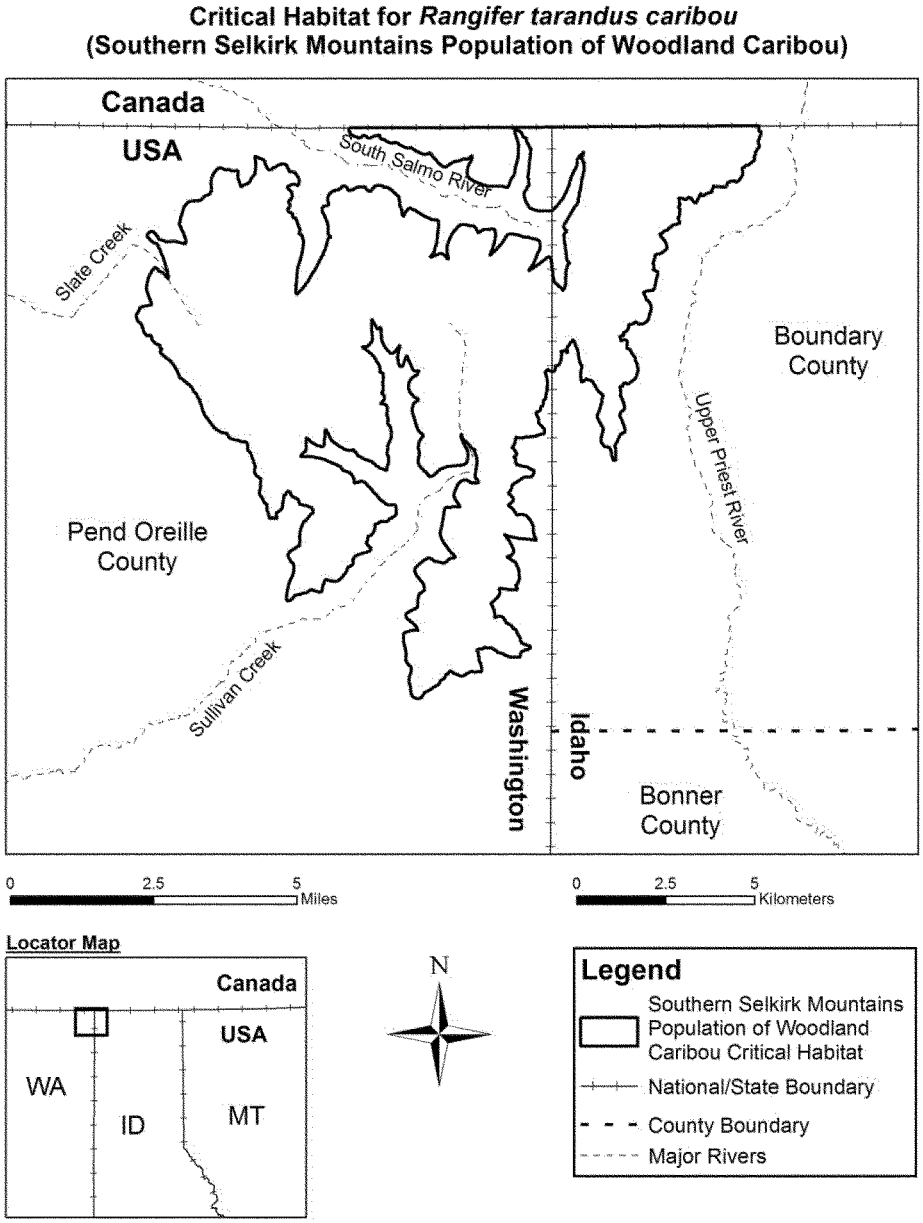
(iv) High-elevation benches and shallow slopes, secondary stream bottoms, riparian areas, and seeps, and subalpine meadows with succulent forbs and grasses, flowering plants, horsetails, willow, huckleberry, dwarf birch, sedges and lichens. The southern Selkirk Mountains population of woodland caribou, including pregnant females, uses these areas for feeding during the spring and summer seasons.

(v) Corridors/Transition zones that connect the habitats described above. If human activities occur, they are such that they do not impair the ability of caribou to use these areas.

(3) Critical habitat does not include manmade structures (such as buildings, roads, and other paved areas) and the land on which they are located existing within the legal boundaries on December 28, 2012.

(4) *Critical habitat map unit.* Data layers defining the map unit were created using a 5,000-ft (1,520-m) elevation layer derived from 30m USGS DEM plus migration-corridor polygons, and units were then mapped using Universal Transverse Mercator (UTM) Zone 11N coordinates. The map in this entry establishes the boundaries of the critical habitat designation. The coordinates or plot points or both on which the map is based are available to the public at the field office Internet site (*http://www.fws.gov/idaho*), at *http://www.regulations.gov* at Docket No. FWS–R1–ES–2011–0096, and at the Service's Idaho Fish and Wildlife Office. You may obtain field office location information by contacting one of the Service regional offices, the addresses of which are listed at 50 CFR 2.2.

(5) *Note:* Unit 1: Boundary County, Idaho, and Pend Oreille County, Washington. The map of the critical habitat unit follows:



* * * * *

Dated: November 14, 2012.

Rachel Jacobson,

Principal Deputy Secretary for Fish and Wildlife and Parks.

[FR Doc. 2012–28512 Filed 11–27–12; 8:45 am]

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